Supreme Court, U.S.
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No. 03 520 OCT 6 - 2003

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL K. PLILER, Warden of California State Prison - Sacramento, *Petitioner,*

v.

JOSEPH HUNT, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court held over twenty years ago that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. 509, 522 (1981). The question presented is:

Whether, given the enactment of a one-year limitation period for filing federal habeas petitions, *see* 28 U.S.C. § 2244, the dismissal of a "mixed" habeas petition under *Rose v. Lundy* is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies, and advises the petitioner that if the court dismisses the petition the one-year limitation period may bar any future federal claims.

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IN THE SUPREME COURT OF THE UNITED STATES

No.

CHERYL K. PLILER, Warden of California State Prison - Sacramento, *Petitioner,*

v.

JOSEPH HUNT, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Cheryl K. Pliler, Warden of California State Prison—Sacramento (hereafter the Warden), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1/]

OPINION OR JUDGMENT BELOW

The opinion of the Ninth Circuit is reported as *Hunt v. Pliler*, 331 F.3d 681 (9th Cir. 2003), *amended* July 8, 2003. The orders of the District Court denying habeas corpus relief are unreported. All opinions and orders, however, are reproduced in the Appendix (App.) to this Petition.

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1. The instant petition presents the same question as was presented in petitions filed in *Pliler v. Ford*, No. 03-221, and *Adams v. Brambles*, No. 03-357, both of which are pending in this Court.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit vacating and remanding the decision of the district court was amended and entered on July 8, 2003. App. A1. The Ninth Circuit denied the Warden's petition for rehearing with suggestion for rehearing en banc on July 14, 2003. App. B1-B2. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2244 of Title 28 of the United States Code provides in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State . . . .

Rule 15 of the Federal Rules of Civil Procedure provides in pertinent part:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . .

STATEMENT OF THE CASE

On April 22, 1987, respondent Joseph Hunt, a founder and member of the so-called Billionaire Boys Club, was convicted by a jury of the murder and robbery of Ronald Levin, and the special circumstance of robbery. Hunt was sentenced to life in prison without the possibility of parole. After unsuccessfully challenging his conviction in state court, Hunt filed a *pro se* First Amended Petition in the United States District Court for the Central District of California on August 31, 1998. The Warden moved to dismiss the First Amended Petition on the ground that many of the claims set forth therein were unexhausted.

On November 22, 1999, the magistrate judge issued an order finding that twenty-seven of the seventy-one claims presented in the First Amended Petition were fully exhausted, five were partially exhausted, thirty-six were unexhausted, and three did not state a federal claim. App. C7-C41. He concluded that "unless Petitioner elects to move for leave to file a Second Amended Petition containing only exhausted claims, this Court will be required to dismiss the entire action without prejudice." App. C36. The magistrate judge cautioned Hunt that he "risk[ed] forfeiture of the unexhausted claims . . . if he elect[ed] to file a Second Amended Petition containing only exhausted claims and later attempt[ed] to file a second federal habeas action after exhausting his state remedies." App. C36 n.15.

Hunt sought relief from the district judge. On December 8, 1999, Hunt applied to the district judge for an order extending the time within which to file a Second Amended Petition. He also filed objections to the November 22 magistrate judge's order. The application and objections were not ruled on by the district judge.

On July 20, 2000, however, the magistrate judge issued a second order reserving Hunt's objections for further review by the district judge. App. D1. This order also directed Hunt to file a motion by August 18, 2000 for leave to file a Second

Amended Petition and informed Hunt that he "may stand on his First Amended Petition; however, if he elects to do so . . . the case cannot proceed further since it is based on a mixed petition containing both exhausted and unexhausted claims." App. D2.

Hunt thereafter filed a habeas corpus petition with the California Supreme Court, which was denied. Based upon that filing and denial, on September 8, 2000, Hunt applied to vacate the magistrate judge's earlier nonexhaustion findings. The application was denied by minute order dated September 14, 2000: "Petitioner's assertion that he exhausted his unexhausted claims by presenting them to the California Supreme Court subsequent to commencing this action is irrelevant to this Court's prior determination that the First Amended Petition contains unexhausted claims." App. E2.

Hunt sought review from the district judge, but on December 19, 2000, the district judge denied Hunt's request: "Petitioner . . . cannot rely on a later-filed state habeas petition to exhaust claims that were not exhausted at the time his federal petition was filed." The district judge gave Hunt until January 16, 2001, to file a motion for leave to file a Second Amended Petition. App. F2.

On January 18, 2001, Hunt lodged a proposed Second Amended Petition, which included all but one of the claims previously found to be unexhausted, plus a number of new claims. Hunt simultaneously lodged a Third Amended Petition, which he contended contained only exhausted claims, and requested that it be held in abeyance pending adjudication of the Second Amended Petition.

On January 31, 2001, the magistrate judge denied leave to amend on the ground that exhaustion must be established "*before* coming to the federal district court . . . ." App. G4 (emphasis in original). The magistrate judge reasoned that permitting a federal habeas petitioner "to amend his petition to add claims or otherwise obtain review of claims that were not exhausted until well after the limitations period expired would be tantamount to tolling the limitations period while only the

federal habeas petition was pending, something Congress did not intend under 29 U.S.C. § 2244(d)(2)." App. G7. The magistrate judge gave Hunt until February 20, 2001, to move for leave to file a Third Amended Petition containing only exhausted claims or, alternatively, to stand on his First Amended Petition containing unexhausted claims, which would lead to a recommendation to dismiss. Hunt was warned that his failure to file a timely motion for leave to file a Third Amended Petition or to respond to the magistrate judge's order would "be construed as either his consent to dismissal of the action for failure to prosecute or disobedience with a Court Order warranting the dismissal of the action with prejudice pursuant to Fed. R. Civ. P. 41(b)." App. G8-G9.

On February 23, 2001, Hunt objected to the magistrate judge's January 31 order, contending he was entitled to district court review of dispositive orders. He also applied for an order permitting him to make an election as to how he would proceed after the district judge reviewed his objections to the January 31 order.

Before any action was taken by the district judge on Hunt's application, the magistrate judge, on March 26, 2001, issued a Report and Recommendation, recommending that Hunt's request for a stay pending adjudication of his objections to the January 31 order be denied, that the First Amended Petition be dismissed as a mixed petition, and that the action be dismissed with prejudice for failure to prosecute and obey the court's orders. On August 27, 2001, the magistrate judge rejected Hunt's objections to the Report and Recommendation, concluding that "there is no authority authorizing a district court to hold a mixed petition in abeyance while the petitioner returns to state court to exhaust his unexhausted claims." The magistrate judge reiterated his prior recommendation. App. H5-H6.

The district judge adopted the Final Report and Recommendation after having "made a de novo determination." He denied Hunt's application for a stay, granted the motion to

dismiss the First Amended Petition as mixed, and directed entry of judgment dismissing the action with prejudice. App. H7-H8.

The district judge subsequently granted a certificate of appealability on two issues: "(1) whether the district court abused its discretion in dismissing the action with prejudice for failure to prosecute and failure to obey court orders; and (2) whether the First Amended Petition was properly dismissed as a mixed petition." App. A10.

In a published decision authored by District Court Judge William W. Schwarzer of the Northern District of California (sitting by designation), and joined by Ninth Circuit Judges Dorothy W. Nelson and Thomas G. Nelson, the panel relied upon the Ninth Circuit's recent decision in *Ford v. Hubbard*, 330 F.3d 1086 (9th Cir. 2003), and held as follows:

> Neither the magistrate judge nor the district court judge considered the alternative of staying the petition after dismissal of unexhausted claims to permit Hunt to exhaust those claims, nor did they inform Hunt of this option. Had Hunt been so informed, the protracted proceedings in which he sought to protect his ability to proceed on claims he believed to have been exhausted – and which eventually resulted in the dismissal with prejudice – would have been avoided.
>
> We conclude that under the circumstances presented by this record, the failure to advise Hunt of his options with respect to the First Amended Petition renders its dismissal improper.

App. A16-A17.

The panel vacated the district judge's dismissal of the action and remanded for a de novo review of the magistrate judge's November 22 order. The panel further directed that "[i]f the [district] court finds the petition to be mixed, the court should advise Hunt of his option to dismiss the unexhausted claims and stay the First Amended Petition pending return to

state court to exhaust those claims." App. A18.

The Warden's petition for rehearing with suggestion for rehearing en banc was denied on July 14, 2003. App. B1-B2.

On July 21, 2003, the Warden filed a motion to stay the issuance of the mandate in the Ninth Circuit. On July 28, 2003, the Ninth Circuit granted the motion.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit has decided important and recurring issues regarding the dismissal of mixed habeas petitions under *Rose v. Lundy* in a way that conflicts with decisions of this Court, institutionalizes a "stay and abeyance" procedure of unlikely merit, places a significant burden on the district courts, and is inconsistent with decisions of other circuit courts of appeals and federal law.

Relying upon *Ford v. Hubbard*, 330 F.3d at 1086, the panel in this case concludes that Hunt's mixed First Amended Petition was improperly dismissed because Ninth Circuit authority "contemplate[s] that district courts may stay and abey a mixed petition, permitting petitioner to return to state court and exhaust unexhausted claims." App. A15; *see also* App. A16. According to the panel, the district court abused its discretion because "it did not advise Hunt that he had the option to stay his First Amended Petition after dismissal of unexhausted claims to permit him to exhaust those claims and then add them by amendment to his stayed petition, as it was obliged to do." App. A16. The panel's holding in that regard ignores over twenty years of Supreme Court precedent, which unwaveringly requires "a district court [to] *dismiss* habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. at 522 (emphasis added).

Ford also compels district courts to provide warnings about the one-year limitation period of the Antiterrorism and

Effective Death Penalty Act of 1996 (hereafter the AEDPA) before dismissing a mixed petition. Since *Ford*, district courts have been required to advise a habeas petitioner "that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opt[s] to dismiss the petition[] 'without prejudice' and return to state court to exhaust all of his claims." *Ford v. Hubbard*, 330 F.3d at 1093. By adopting *Ford's* reasoning in that regard, the panel's decision runs afoul of Supreme Court precedent. This Court has never required such warnings or advisements; nor has it ever held that their absence renders the dismissal of a mixed petition erroneous. *See Duncan v. Walker*, 533 U.S. 167, 178-79 (2001); *Rose v. Lundy*, 455 U.S. at 522.

At least three other circuit courts of appeals have rejected the panel's approach in this case. Thus, the decision conflicts with *Rose v. Lundy*, institutionalizes a "stay and abeyance" procedure of dubious merit, imposes new and onerous burdens on district courts in connection with the dismissal of mixed habeas petitions, and clashes with the holdings of other federal appellate courts.

1. In a long line of cases commencing with *Rose v. Lundy*, this Court has repeatedly held that "because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, . . . a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. at 522; *id.* at 518-19 ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error"); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims"); *Castille v. Peoples*, 489 U.S. 346, 349 (1989) ("Respondent's habeas petition should have been dismissed if state remedies had not been exhausted as to any of

the federal claims"); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring) ("In *Rose v. Lundy*, . . . the Court announced that a habeas petition containing exhausted and unexhausted claims must be dismissed"); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982) ("If [an unexhausted] claim were present, *Rose v. Lundy*, . . . would mandate dismissal of the entire petition").

The same principles apply to cases subject to the AEDPA. In *Duncan v. Walker*, 533 U.S. at 167, this Court concluded that "[t]he exhaustion requirement [set forth in the AEDPA] ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Id.* at 178-79. The *Duncan* majority also noted that "[t]olling the limitation period for a federal habeas petition that is dismissed without prejudice would . . . create more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves. We do not believe that Congress designed the statute in this manner." *Id.* at 180.

2. The panel's decision conflicts with Supreme Court precedent, by institutionalizing a "stay and abeyance" procedure whereby a mixed petition may be filed, unexhausted claims dismissed, and a stay of proceedings obtained for the purpose of exhausting the dismissed claims in state court. Once the dismissed claims are exhausted, they may be added to the pending federal petition by way of amendment, and are deemed to "relate back" to that petition for purposes of the AEDPA's limitation period (even where such claims were time-barred *prior* to their filing in state court). Thus, despite this Court's insistence that only the timely filing of a claim in *state* court may toll the AEDPA's limitation period, *see Duncan v. Walker*, 533 U.S. at 179-80, the panel in this case holds that the timely filing of a habeas petition in *federal* court may toll the limitation period for unexhausted and otherwise time-barred claims, through amendment and relation back. If allowed to stand, the

panel's holding would eviscerate the AEDPA's limitation period, and reduce district courts to "a jurisdictional parking lot." *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995). As this Court stated in *Rose v. Lundy*, "strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition." 455 U.S. at 520. The panel's holding will encourage the very opposite.

Indeed, federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992); *In re Blodgett*, 502 U.S. 236, 239-40 (1992) (*per curiam*). Considerations of comity compel the timely consideration of matters in federal habeas cases, because of their importance to the State, as well as the prospect of undue delay in the execution of judgment. *See In re Blodgett*, 502 U.S. at 239 ("The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decision[] in *Rose v. Lundy*"); *but cf. Duncan v. Walker*, 533 U.S. at 182 (Souter, J., concurring) ("[N]othing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies"); *see also id.* at 182-83 (Stevens, J., concurring) ("[I]n our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies").

3. The panel's application of the relation back doctrine is inconsistent with federal habeas law. Rule 15(c) of the Federal Rules of Civil Procedure provides that an amendment of a pleading relates back to the date of the original pleading when "relation back is permitted by the law that provides the

statute of limitations applicable to the action, or [¶] . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." Rule 11 of the Rules Governing Section 2254 Cases in turn provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." *See also Harris v. Nelson*, 394 U.S. 286, 295 (1969) (the drafters' intent with respect to the 1938 creation of the Federal Rules of Civil Procedure "indicates nothing more than a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings").

Rule 15(c) applies only to proceedings that are governed by a statute of limitations. Indeed, the Advisory Committee Notes to Rule 15(c) state in pertinent part that "[r]elation back is intimately connected with the policy of the statute of limitations." *See also Order of R.R. Telegraphers v. R.R. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944) (rationale of statute of limitations in civil actions is to prevent the bringing of stale claims); *compare Teague v. Lane*, 489 U.S. at 306 (O'Connor, J.) (purpose of habeas corpus jurisprudence is to leave "'concluded litigation in a state of repose'"). At the time of its enactment, Rule 15(c) did not govern the filing of habeas petitions, because there was no need for newly-presented claims to relate back to a previous filing; until the AEDPA, there was no statutory limitation period that applied to habeas corpus proceedings. *See Harris v. Nelson*, 394 U.S. at 295-96.

And, as stated previously, application of Rule 15(c) to habeas cases is inconsistent with the plain meaning of the AEDPA. *See Duncan v. Walker*, 533 U.S. at 179-80. Thus, to allow relation back of claims where the limitation period had expired prior to their presentation in *state* court would be contrary to "the law that provides the statute of limitations applicable to the action . . . ." *See* Fed. R. Civ. P. 15(c); Rule 11, foll. 28 U.S.C. § 2254; *see also Harris v. Nelson*, 394 U.S.

at 294 ("Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense").

4. The panel's holding in that regard also conflicts with the decisions of at least two other circuit courts of appeals. In *Victor v. Hopkins*, 90 F.3d 276 (8th Cir. 1996), the Eighth Circuit held that district courts lack authority to hold mixed petitions in abeyance, even in capital cases. As the court stated:

> We conclude that any suggestion in our prior cases that a district court has broad discretion to hold in abeyance a habeas petition including both exhausted and unexhausted claims pending exhaustion of state remedies is contrary to the Supreme Court's explicit directions in *Rose v. Lundy*. . . . The correct view is represented by our line of cases . . . in which we have given recognition to the clear teaching of *Rose v. Lundy* regarding the treatment of mixed petitions. Accordingly, we hold that the District Court has no authority to hold Victor's mixed petition in abeyance or to maintain the stay of execution. The choices stated in *Rose v. Lundy* are the only options available to a habeas petitioner.

Id. at 282; *see also Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003) (following *Victor*, rejecting the Ninth Circuit's "stay and abeyance" procedure, and concluding that, "[a]bsent contrary controlling Supreme Court authority, we are bound to follow our own precedents and the Supreme Court's view as expressed in *Rose v. Lundy*"); *Jackson v. Dormire*, 180 F.3d 919, 920 (8th Cir. 1999) (following *Victor*); *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (same).

In *Sterling v. Scott*, 57 F.3d at 451, the Fifth Circuit upheld the district court's dismissal of a mixed habeas petition in a capital case:

> As referred to earlier, 28 U.S.C. § 2254(b) provides that an application for a writ of habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." . . . The district court must also dismiss a mixed petition, such as Sterling's petition, containing both exhausted and unexhausted claims. . . . Accordingly, the district court was correct in dismissing Sterling's amended federal petition for failing to exhaust his state remedies as required in § 2254, and the district court did not err in refusing to hold in abeyance a petition over which it simply and plainly had no jurisdiction. . . .

Id. at 454; *see also Alexander v. Johnson*, 163 F.3d 906, 908 (5th Cir. 1998) ("A habeas petition containing both exhausted and unexhausted claims is a 'mixed' petition which should be dismissed without prejudice"); *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) ("A federal habeas petition should be dismissed if state remedies have not been exhausted as to all of the federal court claims"); *McGrew v. Texas Bd. Of Pardons & Paroles*, 47 F.3d 158, 161 (5th Cir. 1995) ("McGrew's allegations reflect that he has not exhausted his state remedies and, therefore, insofar as his complaint can be construed as seeking habeas relief, it must be dismissed for failure to exhaust"); *cf. Thompson v. Sec'y for Dep't of Corr.*, 320 F.3d 1228, 1229-30 & n.3 (11th Cir. 2003) (district court did not abuse its discretion by dismissing mixed habeas petition where petitioner failed to respond to district court's inquiry regarding the dismissal of unexhausted claims, despite petitioner's claim that he was compelled to file a mixed petition in order to meet the AEDPA's one-year filing deadline and preserve federal review of the exhausted claims).

5. Moreover, no court (other than the Ninth Circuit) has ever held that a district court must advise a habeas petitioner that his federal claims may be time-barred, absent any equitable tolling, if he chooses to dismiss a mixed petition and return to state court to exhaust his newly-presented claims. As the dissent in *Ford* cogently observed, "the district judge will almost never be able to tell, solely from the face of the petition, that the statute of limitations has expired." *Ford v. Hubbard*, 330 F.3d at 1108.

6. The panel's requirement that petitioners be advised of the AEDPA's limitation period is also inconsistent with the Second Circuit's holding in *Warren v. Garvin*, 219 F.3d 111 (2d Cir. 2000). There, the appellant argued that his second habeas petition should be treated as a motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and regarded as a continuation of his first petition; the appellant maintained that such relief was warranted because he was not warned in the first proceeding that the AEDPA's limitation period would preclude him from refiling. *Id.* at 114. In rejecting that argument, the Second Circuit held:

> Warren contends that he is entitled to relief "because [he] was never informed of the effect of a dismissal on his ability to bring a subsequent petition." However, appellant knew of the 1-year limitations period for habeas petitions under the AEDPA, and his failure to timely refile (or to pursue his additional state claims) is merely garden variety neglect. Because "excusable neglect" is a ground for relief under Rule 60(b)(1), it cannot be considered under Rule 60(b)(6). Therefore, Warren's petition, even if treated as a motion under Rule 60(b), must be denied.

Id. at 114-15; *see also Zarvela v. Artuz*, 254 F.3d 374, 378, 380 (2d Cir. 2001) (citing *Warren*).

Given the Ninth Circuit's implementation of a "stay and abeyance" procedure involving mixed habeas petitions, its erroneous application of the relation back doctrine, and the conflict between the circuits, guidance from this Court is now necessary.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: October 6, 2003

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH HUNT, **Petitioner-Appellant,** **v.**	**No. 01-56963**
CHERYL PLILER, Warden CSP-Sac; CAL TERHUNE, Director of the CDC; CALIFORNIA DEPARTMENT OF CORRECTIONS; CALIFORNIA STATE ATTORNEY GENERAL, **Respondents-Appellees.**	**D.C. No. CV-98-05280-WDK** **AMENDED OPINION**

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Argued and Submitted
December 4, 2002 - Pasadena, California

Opinion Filed June 5, 2003
Amended July 8, 2003

Before: Dorothy W. Nelson and Thomas G. Nelson,
Circuit Judges, and William W. Schwarzer,*
Senior District Judge.

Opinion by Judge Schwarzer

*The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals vacated a judgment of the district court. The court held that a district court abuses its discretion in dismissing with prejudice a habeas corpus petition when the judicial procedure leading to the dismissal fails to comply with 28 U.S.C. § 636 and Federal Rule of Civil Procedure 72, thus depriving the petitioner of the right to de novo review of a magistrate judge's pivotal determination that the petition contains unexhausted claims.

Appellant Joseph Hunt was convicted of murder and sentenced to life in prison without possibility of parole. After unsuccessfully challenging his conviction in California state court, Hunt filed, *pro se*, a federal habeas petition, his first amended petition. Upon a motion to dismiss the petition, the magistrate judge issued an order finding that the first amended petition contained claims that were not exhausted, instead of issuing a report and recommendation for district court review, as required by § 636(b)(1)(B). Hunt filed objections to the magistrate judge's order with the district court, contending that the magistrate judge wrongfully found that some claims were not exhausted. The district court did not rule on Hunt's objections. The magistrate judge issued a subsequent order directing Hunt to move for leave to file a second amended petition if he wished to proceed, and warning Hunt that if he elected to stand on his first amended petition the case could not proceed further since it was based on a mixed petition. Hunt again directed objections to the district court, reasserting his earlier objections. The district court did not rule on the objections.

Meanwhile, Hunt filed another state habeas petition with the California Supreme Court to obtain confirmation that all his federal claims had been exhausted. The state court denied Hunt's habeas petition. Hunt then applied to the district court and the magistrate judge to vacate the magistrate judge's earlier

nonexhaustion findings. The magistrate judge denied Hunt's application, as did the district court. Hunt then lodged a proposed second amended petition, including many of the previously advanced claims, contending that the Supreme Court's order confirmed that they had all been exhausted. Hunt simultaneously lodged a third amended petition, containing only exhausted claims, and requested it to be held in abeyance pending adjudication of the second amended petition. The magistrate judge denied leave to amend on the ground that exhaustion must be established before coming to federal district court. The magistrate judge did not inform Hunt of the stay and abey procedure. Ultimately, the magistrate judge issued a report recommending that Hunt's request for a stay pending adjudication of his objections be denied, that the first amended petition be dismissed as a mixed petition, and that the action be dismissed with prejudice for failure to prosecute and obey the court's orders. The district court adopted the magistrate judge's recommendations, and directed entry of judgment dismissing the action with prejudice.

Hunt appealed.

[1] Under § 636(b)(1), a district court may designate a magistrate judge to hear a motion to dismiss and submit proposed findings of fact and recommendations for the disposition of such a motion. However, a district judge may not designate a magistrate judge to hear and determine a motion to involuntary dismiss an action. Additionally, under Rule 72(b), when a party filed written objections to the magistrate judge's proposed disposition, the district judge must make a de novo determination upon the record. **[2]** Because the motion to dismiss the first amended petition as mixed was a dispositive matter, the magistrate judge exceeded his statutory authority in determining the motion. Further, the magistrate judge did not submit proposed findings and recommendations with respect to that motion as required, and, although Hunt filed objections to that order the district judge did not review it or make the required de novo determination. **[3]** Thus, because the

procedure leading to the dismissal of Hunt's first amended petition with prejudice failed to comply with § 636 and Rule 72, depriving Hunt of the right to de novo review of the magistrate judge's pivotal determination that the first amended petition contained unexhausted claims, the district court abused its discretion. **[4]** The district court also abused its discretion by dismissing the petition with prejudice for failure to prosecute and to comply with court orders.

[5] In addition, because the district court, in dismissing the first amended petition, acted on the premise that all claims had to have been exhausted at the time the petition was filed, it did not advise Hunt that he had the option to stay his first amended petition after dismissal of unexhausted claims to permit him to exhaust those claims and then add them by amendment to his stayed petition, as it was obliged to do. **[6]** Under the circumstances, the failure to advise Hunt of his options with respect to the first amended petition rendered its dismissal improper. Thus, the judgment of the district court had to be vacated.

COUNSEL

Eric S. Multhaup, Mill Valley, California, for the petitioner-appellant,

Richard B. Cullather, Deputy Attorney General, for the respondents-appellees.

OPINION

SCHWARZER, Senior District Judge:

Joseph Hunt appeals the dismissal with prejudice of his habeas corpus petition. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we vacate and remand because the district court failed to proceed in conformity with 28 U.S.C. § 636.

FACTUAL AND PROCEDURAL BACKGROUND

On April 22, 1987, Joseph Hunt was convicted by a jury of the murder and robbery of Ronald Levin, and the special circumstance of robbery. He was sentenced to life in prison without possibility of parole. After unsuccessfully challenging his conviction in the state court system, Hunt on August 31, 1998, filed in the district court, *pro se*, a First Amended Habeas Petition. Respondents moved to dismiss, contending that many of Hunt's claims were not exhausted. There ensued a tortuous procedural hegira, which we now review.

On November 22, 1999, the magistrate judge issued a document styled "Memorandum and Order Re Respondent's Motion to Dismiss." He found that of the seventy-one claims presented in the First Amended Petition, twenty-seven were fully exhausted, five were partially exhausted, thirty-six were unexhausted, and three did not state a federal claim. He concluded that "unless Petitioner elects to move for leave to file a Second Amended Petition containing only exhausted claims, this Court will be required to dismiss the entire action without prejudice." The magistrate judge further advised that "Petitioner risks forfeiture of the unexhausted claims . . . if he elects to file a Second Amended Petition containing only exhausted claims and later attempts to file a second federal habeas action after exhausting his state remedies." Rather than issuing a report and recommendation for district court review,

as required by 28 U.S.C. § 636(b)(1)(B), the magistrate judge issued an order granting time to file a motion for leave to file a Second Amended Petition containing only exhausted claims or, alternatively, a request for voluntary dismissal without prejudice. He warned that failure to timely file a motion for leave to file such a petition "shall be construed as either his consent to dismissal of the action for failure to prosecute or disobedience with a Court Order warranting the dismissal of the action with prejudice pursuant to Fed. R. Civ. P. 41(b)."

On December 8, 1999, Hunt filed an application directed to the district judge, for an order extending the time within which to file a Second Amended Petition pending resolution of his objections to the magistrate judge's order filed concurrently. Hunt objected to the November 22 order on the grounds that "the Magistrate wrongfully found nonexhaustion as to several issues."

The district judge ruled neither on Hunt's objections nor on his application for an extension of time. Instead, on December 20, the magistrate judge issued an order stating that "[i]n light of the filing of an objection to the magistrate's 'Recommendation and Order . . .' Petitioner will have 30 days from notice of this Court's ruling on the Objection in which to file a motion for leave to file a Second Amended Petition."

On July 20, 2000, the *magistrate judge* issued an order responding to what he referred to as "timely Objections . . . to the magistrate judge's non-dispositive Memorandum and Order . . . filed November 22, 1999." The order stated that objections to the magistrate judge's rulings on exhaustion "are reserved and are subject to further review by [the district judge]." Nonetheless, the order directed that "if Petitioner wishes to proceed in this matter" he must file a motion for leave to file a Second Amended Petition by August 18, 2000. The order advised Hunt that if he elected to stand on his First Amended Petition the case could not proceed further since it was based on a mixed petition. Further, the order warned that the magistrate judge would recommend to the district judge that the First

Amended Petition be dismissed without prejudice as a mixed petition.

On July 31, 2000, Hunt again directed objections to the district judge, reasserting his objections to the November 22 order as well as to the July 20 order. He argued that if he were to file a Second Amended Petition before the court ruled on his objections it might moot his objections because the claims would no longer be pending before the court. The district judge did not rule on the objections, but on August 11, the magistrate judge issued an order extending until October 2, 2000, Hunt's time to file a motion for leave to file a Second Amended Petition along with a petition "complying with the magistrate judge's November 22, 1999, Memorandum and Order and July 20, 2000, Order Re Petitioner's Objections," and denying the application for clarification of the July 20 order.

Meanwhile, on February 23, 2000, Hunt had filed another state habeas corpus petition with the California Supreme Court to obtain confirmation that all his federal claims had previously been presented to that court and thus had been exhausted. On August 9, 2000, the California Supreme Court denied Hunt's habeas petition by order stating: "Petition for writ of habeas corpus is denied. (*In re Waltreus* (1965) 62 Cal. 2d 218, 225; *In re Miller* (1941) 17 Cal. 2d 734, 735; *In re Clark* (1993) 5 Cal. 4th 750.)."

Following receipt of the Supreme Court's order, Hunt, on September 8, 2000, filed an application directed to the district judge and the magistrate judge to vacate the magistrate judge's earlier nonexhaustion findings in light of the Supreme Court's August 9 order. Hunt argued that the citations to *In re Waltreus* and *In re Miller* are "an explicit determination by the California Supreme Court that they view the sum total of what Petitioner presented to them as a *relitigation* of claims Petitioner has previously presented to them." The court's rejection of his petition, Hunt argued, confirmed that his claims were exhausted prior to his first federal filing.

On September 14, the magistrate judge denied Hunt's

application, stating that "[p]etitioner's assertion that he exhausted his unexhausted claims by presenting them to the California Supreme Court subsequent to commencing this action is irrelevant to this Court's prior determination that the First Amended Petition contains unexhausted claims," citing *Gatlin v. Madding*, 189 F.3d 882, 889 (9th Cir. 1999), and *Brown v. Maass*, 11 F.3d 914, 915 (9th Cir. 1993), *appeal after remand*, 46 F.3d 1139 (9th Cir. 1995). The order reminded Hunt that he had until October 2 to file a motion for leave to file a Second Amended Petition.

On December 19, the district judge denied Hunt's request to vacate the magistrate judge's September 14 order, ruling that "Petitioner . . . cannot rely on a later-filed state habeas petition to exhaust claims that were not exhausted at the time his federal petition was filed." The order gave Hunt until January 16, 2001, to file a motion for leave to file a Second Amended Petition.

On January 18, 2001, Hunt lodged a proposed Second Amended Petition, including all but one of the claims previously found to be unexhausted plus a number of new claims, contending that the Supreme Court's order confirmed that they had all been exhausted. Hunt simultaneously lodged a Third Amended Petition, which he contended contained only exhausted claims, and requested it be held in abeyance pending adjudication of the Second Amended Petition. On January 31, 2001, the magistrate judge, declining to follow this court's recent decision in *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001), denied leave to amend on the ground that under earlier Ninth Circuit decisions exhaustion must be established "*before* coming to federal district court." The magistrate judge gave Hunt until February 20, 2001, to move for leave to file a Third Amended Petition containing only exhausted claims or, alternatively, to stand on his First Amended Petition containing unexhausted claims, which would lead to a recommendation to dismiss. Failure to pursue either course, the magistrate judge advised, would be

construed as either consent to dismissal for failure to prosecute or disobedience of the court's order warranting dismissal with prejudice. The magistrate judge did not inform Hunt of the stay and abey procedure.

On February 23, 2001, Hunt objected to the magistrate judge's January 31 order disposing of the Second Amended Petition, contending he was entitled to district court review of dispositive orders pursuant to 28 U.S.C. § 636(b). Further, he applied for an order permitting him to make an election as to how he would proceed after the district judge reviewed his objections to the January 31 order denying leave to file the Second Amended Petition. The district judge never acted on this application.

On March 26, the magistrate judge issued a Report and Recommendation, recommending that Hunt's request for a stay pending adjudication of his objections to the January 31 order (denying leave to file a Second Amended Petition) be denied, that the First Amended Petition be dismissed as a mixed petition, and that the action be dismissed with prejudice for failure to prosecute and obey the court's orders. Following the filing of objections by Hunt, the magistrate judge, on August 27, 2001, rejected the objections, ruled that "there is no authority authorizing a district court to hold a mixed petition in abeyance while the petitioner returns to state court to exhaust his unexhausted claims," and reiterated his prior recommendation.

On the same day, the district judge issued an order, stating that he "has made a *de novo* determination," and adopting the magistrate judge's Reports and Recommendations, denying the application for a stay, granting the motion to dismiss the First Amended Petition as mixed, and directing entry of judgment dismissing the action with prejudice.

DISCUSSION

This appeal is before us on the district court's Certificate of Appealability stating two issues: (1) whether the district court abused its discretion in dismissing the action with prejudice for failure to prosecute and failure to obey court orders; and (2) whether the First Amended Petition was properly dismissed as a mixed petition. Review of dismissal of a habeas corpus petition is *de novo*. *Park v. California*, 202 F.3d 1146, 1149 (9th Cir. 2000), *cert. denied*, 531 U.S. 918 (2000).

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING THE ACTION FOR FAILURE TO PROSECUTE AND FAILURE TO OBEY COURT ORDERS

A. The District Court Abused Its Discretion By Failing To Comply With The Statutory Procedure

[1] A district judge may not designate a magistrate judge to hear and determine a motion to involuntarily dismiss an action. 28 U.S.C. § 636(b)(1)(A);[1] *see Taylor v. Oxford*, 575

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1. 28 U.S.C. § 636 (b)(1)(A) provides:

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to

F.2d 152, 154 (7th Cir. 1978); *see also Estate of Conners v. O'Connor*, 6 F.3d 656, 659 (9th Cir. 1993) ("'[I]t was not intended that the magistrate would have the power to hear and determine dispositive motions [it was only intended that a judge could assign a dispositive motion to a magistrate for hearing and submission of proposed findings and recommendation o the judge for ultimate disposition.'") (quoting *Taylor*, 575 F.2d at 154 (second alteration in original)). A judge may, however, under § 636(b)(1)(B), designate a magistrate judge to hear a motion to dismiss and submit proposed findings of fact and recommendations for the disposition of such a motion.[2/] Where a party files written objections to the proposed disposition, "[t]he district judge to whom the case is assigned shall make a de novo determination upon the record." Fed. R. Civ. P. 72(b). *See McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991) ("[W]ith respect to dispositive matters, a magistrate is only permitted to make recommendations for final disposition by an Article III judge who reviews his findings and recommendation, if objected to, de novo.").

[2] These statutory directives were ignored by the district court. Respondents' motion to dismiss the First Amended Petition as mixed was a dispositive matter. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982) (holding that a mixed petition must be dismissed). Thus, the magistrate judge's November 22 Memorandum and Order determining Respondents' motion to

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law.

2. 28 U.S.C. § 636(b)(1)(B) provides:

> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [sic] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

dismiss Hunt's First Amended Petition as mixed exceed his statutory authority. The magistrate judge did not submit proposed findings and recommendations with respect to that motion as required by § 636(b)(1)(B). And although Hunt filed objections to that order the district judge did not review it, much less did he make a de novo determination. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) ("The statute makes it clear that the district judge must review the magistrate judge's findings and recommendations de novo *if objection is made*, but not otherwise.") (en banc). Instead, in his December 19, 2000, order, the district judge merely passed on the procedure by which Hunt had sought to have the Supreme Court confirm that his claims had been exhausted. Ultimately, the district court summarily dismissed the petition as mixed without review of the magistrate judge's determination. That dismissal, moreover, was with prejudice on the basis of the magistrate judge's unreviewed finding that Hunt had failed to prosecute the action and disobeyed the court's orders.

As noted, in making his November 22, 1999, determination that Hunt's petition was mixed, the magistrate judge, instead of submitting proposed findings and recommendations, issued an order, not authorized by the statute, that required Hunt to forfeit the claims he found unexhausted or face dismissal of the entire petition, effectively with prejudice because any newly filed petition would be barred by AEDPA's one-year statute of limitations. *See* 28 U.S.C. § 2244 (d). Hunt duly filed objections to the order but the district judge failed to make the *de novo* determination required by § 636. Under § 636(b)(1)(B) the "authority and the responsibility to make an informed, final determination rests with the judge. . . . The delegation of duties to the magistrate does not violate Article III if the ultimate decision is made by the district court." *Britt v. Simi Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983) (citing *United States v. Raddatz*, 447 U.S. 667, 682-83(1980)). This court has emphasized that "the district court

must actually exercise its discretion, rather than summarily accepting or denying" the magistrate judge's findings. *United States v. Howell*, 231 F.3d 615, 622 (9th Cir. 2000), *cert. denied*, 534 U.S. 831 (2001). Here the district court failed to exercise its discretion.

In his Final Report of August 27, 2001, the magistrate judge stated that his orders were proper because they were not claim dispositive on the theory that a magistrate judge can dismiss a complaint with leave to amend without court approval, citing *McKeever*, 932 F.2d at 798. But the orders in this case can hardly be considered equivalent to a dismissal with leave to amend because they compelled Hunt to abandon claims he contended had been exhausted or face dismissal of his entire petition with prejudice. Moreover, as *McKeever* notes, "District court review of even these non-dispositive matters . . . can be compelled upon objection of the party against whom the magistrate has ruled." *Id.* (citing Fed. R. Civ. P. 72(a)). Yet despite Hunt's objections, the district judge failed to review the magistrate judge's nonexhaustion findings.

The magistrate judge asserted that the district judge *had* reviewed the November 22 order. However, the district judge's review of Hunt's objections in his December 19 order was limited to the following statement: "having reviewed Petitioner's Objections, the magistrate judge's September 14, 2000, Minute Order, and the two Applications filed by Petitioner on September 8, 2000, the Court finds that Petitioner's arguments are not persuasive." The September 14, 2000, order referred to determined only that Hunt's presentation of his claims to the California Supreme Court subsequent to the filing of this action was irrelevant to the magistrate judge's prior determination that the First Amended Petition contained unexhausted claims. Thus, the district judge's order did not address the November 22, 1999, order.

Respondents do not address the failure to review that order. They argue that Hunt was not entitled to what respondents refer to as an "immediate interlocutory appeal" of

the January 31 order denying leave to file a Second Amended Petition, but the argument misses the point, i.e., the district court's failure to follow the statutory procedure. In any event, Respondents' position finds no support in their citation to *Magee v. Rowland*, 764 F. Supp. 1375 (C.D. Cal. 1991), which held that an interlocutory appeal does not lie from an interim discovery order.

[3] Because the procedure leading to the dismissal of Hunt's First Amended Petition with prejudice failed to comply with § 636 and Rule 72, depriving Hunt of the right to *de novo* review of the magistrate judge's pivotal determination that the First Amended Petition contained unexhausted claims, the district court abused its discretion.

B. The District Court Abused Its Discretion By Dismissing The Petition With Prejudice For Failure To Prosecute And To Comply With Court Orders

[4] In *Rose v. Lundy*, the Supreme Court held that a mixed federal habeas petition—one containing both exhausted and unexhausted claims—must be dismissed without prejudice. 455 U.S. at 522. The Court directed district courts to give petitioners the choice of returning to state court to exhaust their claims or of amending their petition to present only exhausted claims. *See id.* at 510; *Anthony*, 236 F.3d at 573. It is true, as the magistrate judge observed in his Final Report, that Hunt never requested a stay of his petition pending exhaustion of unexhausted claims. But, on January 18, 2001, Hunt did request that his Third Amended Petition, which he contended contained only exhausted claims, be held in abeyance until the district court determined whether it would accept his Second Amended Petition, which was mixed. Further, Hunt filed objections to the magistrate judge's finding that the First Amended Petition contained unexhausted claims and requested a stay of the Memorandum and Order pending resolution of his objections by the district court. Had the district court

considered the objections and ruled in Hunt's favor there would have been no need to return to state court. Therefore, Hunt was entitled to stand on his First Amended Petition pending a ruling by the district court on his objections without incurring sanctions for failing to prosecute or not complying with court orders, and the court's imposition of sanctions—the dismissal with prejudice for failure to prosecute and obey court orders—was an abuse of discretion.

II. THE FIRST AMENDED PETITION WAS IMPROPERLY DISMISSED AS A MIXED PETITION

The parties argue at length over whether the magistrate judge correctly determined that certain claims in the petition were unexhausted. As we explain below, we need not resolve that issue.

Rather than determining whether the petition contained unexhausted claims, the district court determined that all claims had to have been exhausted at the time the petition was filed. That ruling was in error. As we stated in *Kelly v. Small*, 300 F.3d 1159 (9th Cir. 2002), *reprinted as amended*, 315 F.3d 1063 (2003), *cert. denied*, 123 S. Ct. 2094 (May 19, 2003), "[a] state prisoner is required to exhaust all available state court remedies *before a federal court may grant him habeas relief.*" 315 F.3d. at 1066 (emphasis added). Our cases contemplate that district courts may stay and abey a mixed petition, permitting petitioner to return to state court and exhaust unexhausted claims. *Id.* at 1070; *James v. Pliler*, 269 F.3d 1124, 1126-27 (9th Cir. 2001) (stating that district court may in its discretion hold exhausted claims in abeyance until the unexhausted claims are exhausted and then allow petitioner to amend the stayed petition to add the now-exhausted claims); *Anthony*, 236 F.3d at 575 ("Our precedent unequivocally authorizes district courts to stay fully exhausted federal petitions pending exhaustion of other claims."); *Calderon v.*

United States Dist. Court (Taylor), 134 F.3d 981, 987-88 (9th Cir. 1998) (same). It would make little sense to give district courts discretion to stay petitions containing exhausted claims pending exhaustion of other claims if post-filing exhaustion could not be recognized.

The cases cited in the district court's order are not to the contrary. *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *as amended* by 247 F.3d 904 (2001), simply reiterates black letter law respecting the need to raise the federal law claim in state court to satisfy the exhaustion requirement. In *Gatlin v. Madding*, the court declined to consider the state court's ruling denying a petition that was not filed until after the notice of appeal had been filed in the district court. *Gatlin*, 189 F.3d at 889. And in *Brown v. Maass*, the court rejected the state's contention that Brown had procedurally defaulted on the ground that he had not then exhausted his state remedies. *Brown*, 11 F.3d at 915. *Brown* does not stand for the proposition that in determining whether claims are exhausted, the district court may only consider evidence presented at the time of filing of the petition.

[5] Because the district court, in dismissing the First Amended Petition, acted on the premise that all claims had to have been exhausted at the time the petition was filed, it did not advise Hunt that he had the option to stay his First Amended Petition after dismissal of unexhausted claims to permit him to exhaust those claims and then add them by amendment to his stayed petition, as it was obliged to do. *Kelly v. Small*, 315 F.3d at 1070; *see also Ford v. Hubbard*, 305 F.3d 875, 883-84 (9th Cir. 2002), *as amended* by 330 F.3d 1086 (9th Cir. 2003) (stating that district judge is obligated to inform *pro se* litigant of his options with respect to his mixed petition).

Neither the magistrate judge nor the district judge considered the alternative of staying the petition after dismissal of unexhausted claims to permit Hunt to exhaust those claims, nor did they inform Hunt of this option. Had Hunt been so informed, the protracted proceedings in which he sought to

protect his ability to proceed on claims he believed to have been exhausted—and which eventually resulted in the dismissal with prejudice—would have been avoided.

[6] We conclude that under the circumstances presented by this record, the failure to advise Hunt of his options with respect to the First Amended Petition renders its dismissal improper.

III. REASSIGNMENT

Finally, Hunt requests that this court remand his case for further proceedings before a different judge. "Absent proof of personal bias on the part of the district judge, remand to a different judge is proper only under unusual circumstances." *United States v. Reyes*, 313 F.3d 1152, 1159 (9th Cir. 2002).

In making this determination, the court must consider three factors:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Medrano v. City of Los Angeles, 973 F.2d 1499, 1508 (9th Cir. 1992), *cert. denied*, 505 U.S. 940 (1993) (quoting *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979)). "The first two of these factors are of equal importance, and a finding of one of them would support a remand to a different judge." *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir. 1986).

Here, there is no evidence of previously expressed views

on the part of the district judge. If anything, he displayed indifference to Hunt's case and deferred dispositive decisions to the magistrate judge. Further, there is no reason to believe that the district judge would have "substantial difficulty" in carrying out this court's mandate. Finally, it is not necessary to reassign this case to "preserve the appearance of justice." Accordingly, we deny Hunt's request for assignment of the case to a different judge.

IV. REMAND

We remand to the district court for a *de novo* review of the magistrate judge's November 22, 1999, order. If the court finds the petition to be mixed, the court should advise Hunt of his option to dismiss the unexhausted claims and stay the First Amended Petition pending return to state court to exhaust those claims.

We accordingly vacate the judgment and remand for proceedings consistent with this opinion.

VACATED AND REMANDED.

APPENDIX B

FILED
JUL 14 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH HUNT, **Petitioner-Appellant,** **v.**	**No. 01-56963**
CHERYL PLILER, Warden CSP-Sac; CAL TERHUNE, Director of the CDC; CALIFORNIA DEPARTMENT OF CORRECTIONS; CALIFORNIA STATE ATTORNEY GENERAL, **Respondents-Appellees.**	**D.C. No. CV-98-05280-WDK** **ORDER**

BEFORE: DOROTHY W. NELSON and THOMAS G. NELSON, Circuit Judges, and SCHWARZER,* Senior District Judge

The panel has voted to deny the petition for panel rehearing. Judges Dorothy W. Nelson and Thomas G. Nelson vote to deny the petition for rehearing en banc, and Judge Schwarzer so recommends.

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*The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

FILED
NOV 22 1999

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSEPH HUNT, Petitioner, v. AL TERHUNE, DIRECTOR OF CDC, et al., Respondents.	Case No. CV 98-5280-WDK (AN) MEMORANDUM AND ORDER RE RESPONDENT'S MOTION TO DISMISS THE FIRST AMENDED PETITION

I. PROCEEDINGS

On August 31, 1998, Joseph Hunt ("Petitioner"), a state prisoner proceeding *pro se*, filed a First Amended Petition for Writ of Habeas Corpus ("First Amended Petition") and a First Amended Memorandum of Points and Authorities ("First Amended MP&A"). The First Amended Petition raises numerous claims for federal habeas Corpus relief relating to Petitioner's April 22, 1987 conviction following a jury trial in Los Angeles County Superior Court case number A090435 for first degree murder committed pursuant to a special circumstance and robbery. [First Amended petition ¶¶ 2a-e.] Petitioner was sentenced to a term of life without the possibility of parole in state prison. [*Id.* ¶¶ 2e-f.]

On April 15, 1999 Respondent filed a Motion to Dismiss

the First Amended Petition ("Motion") contending that many of Petitioner's claims are not exhausted. Petitioner filed his Opposition to the Motion in three parts: the first paper, filed on May 24, 1999, is styled as "Petitioner's Opposition to Respondent's Motion to Dismiss" ("Opposition I"); the second paper, filed on May 24, 1999, is styled as "Petitioner's Opposition to Respondent's Motion to Dismiss under the 'Miscarriage of Justice' Exception to the Procedural Default Rule" ("Opposition II"); and the third paper, filed on June 29, 1999, is styled as "Supplement to Petitioner's Opposition to Respondent's Motion to Dismiss (in light of the U.S. Supreme Court's Decision in *O'Sullivan v. Boerckel*)" ("Opposition III"). On July 30, 1999, Respondent filed a Reply.[1/]

On September 3, 1999, Petitioner was permitted to file a Supplemental Brief addressing the Ninth Circuit's recent decision in *Gatlin v. Madding*, 189 F.3d 882 (9th Cir. 1999). On September 23, 1999, Respondent filed a Reply to Petitioner's Supplemental Brief ("Supplemental Reply").

For the reasons discussed below, the magistrate judge finds that some of the challenged claims are not exhausted and will recommend that Respondent's Motion be granted and that the action be dismissed without prejudice unless petitioner timely elects to voluntarily dismiss the unexhausted claims by serving and filing a Motion for Leave to File a Second Amended Petition containing only exhausted claims consistent with this Memorandum and Order.

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1. Petitioner's request to file a "rebuttal" to Respondent's Reply was denied, and his rebuttal papers were ordered stricken from the record. [*See* August 26, 1999 Civil Minutes & Order Striking Filed Document from the Record.]

II. Factual Background and Procedural History

A. Summary of the Facts

In the early 1980s, Petitioner and his friends formed an investment group which they referred to as the "BBC."[2] [Motion, Ex. E at 108-190.][3] A number of people were persuaded to invest significant sums of money in various BBC enterprises and commodities accounts. [*Id.*, Ex. E at 110.] Petitioner had trading authority over the accounts and, over time, eventually either spent or lost all of his investors' funds, with one exception, that of Ron Levin. [*Id.*, Ex. E at 110-111.]

Levin had invested $5 million in one of Petitioner's commodities trading accounts. [*Id.*, Ex. E at 111.] The account showed a profit of $7 million, half of which was owed to Petitioner. [*Id.*] The BBC believed they would be able to use the money from Levin's account to cover their losses and pay their expenses. [*Id.*, Ex. E at 111-112.] As it turned out, however, Levin had no money and the huge profit in his account was actually the result of a hoax Levin played on Petitioner. [*Id.*, Ex. E at 112-113.]

After Petitioner learned of the hoax and confronted Levin, Levin promised to give the BBC $300,000 which he claimed to have obtained from other brokerage houses. [*Id.*, Ex. E at 114-115.] Levin kept putting Petitioner off, and Petitioner told BBC member Tom May that Petitioner would "get the money from Levin, 'no matter what it took.'" [*Id.*, Ex. E at 115.]

Levin disappeared after June 6, 1984, and his body has yet

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2. The BBC was an acronym for the "Bombay Bicycle Club," a bar and nightclub whose name the group adopted. [*See* Motion, Ex. E at 109 n.2.] The media later referred to the BBC as the now infamous "Billionaire Boys Club." [*Id.*]

3. For purposes of the pending Motion only and for ease of review, the factual account of the events leading to Petitioner's conviction is derived from the California Court of Appeal's November 23, 1993 decision on direct appeal. [*See* Motion, Ex. E at 101-291.]

to be found. According to various witnesses at trial, petitioner concocted a scheme to get money from Levin and kill him with the help of Jim Pitman. [*Id.*, Ex. E at 115-117.] Petitioner's plan was set forth in a seven-page "to do" list. [*Id.*, Ex. E at 117.] Petitioner shared his plan with boyhood friend and BBC member Dean Barny. [*Id.*, Ex. E at 117-119.] On the morning of June 7, 1984, Petitioner called Barny and told him that Levin was dead, and Petitioner later showed Barny a $1.5 million check and contract signed by Levin. [*Id.*, Ex. E at 120.]

Shortly thereafter, Pitman was arrested in New York after he tried to sneak out of a hotel without paying the bill. [Id., Ex. E at 124-125.] Pitman had checked into the hotel under Levin's name and tried to use his credit cards to pay the bill, but the cards were rejected. [*Id.*, Ex. E at 124.] A short time later, Petitioner discovered that Levin's check for $1.5 million was not good. [*Id.*, Ex. E at 125.]

On June 24, 1984, Petitioner held a meeting with other BBC members and informed them that there was no money left. [*Id.*, Ex. E at 127.] Petitioner also told the group that he and Pitman had "'knocked off Ron Levin.'" [*Id.*, Ex. E at 128.] Some of the BBC members later went to police, and Petitioner was arrested on September 28, 1984. [*Id.*, Ex. E at 129-131.]

B. Summary of State Court Procedural History

On November 23, 1993, the judgment of Petitioner's conviction was affirmed by the California Court of Appeal. [*See* Motion, Ex. E at 101-291.] On January 5, 1994, Petitioner filed a petition for review in the California Supreme Court ("first petition for review"). [*Id.*, Ex. H at 303-342.] On March 17, 1994, the first petition for review was summarily denied without comment or citation to case authority. [*Id.*, Ex. H at 302.]

Petitioner sought habeas corpus relief concurrent with his appeal. His habeas petition to the California Court of Appeal resulted in the issuance of an order to show cause on February

23, 1993, which was modified on December 21, 1993. [*See id.*, Ex. F at 292-297 & Ex. G at 298-301.] The orders directed that some, but not all, of the issues raised by Petitioner be addressed in the state superior court. [*Id.*]

On January 5, 1994, Petitioner filed another petition for review in the California Supreme Court ("second petition for review"), which challenged the scope of the order to show cause. [*Id.*, Ex. I at 344-390.] On March 17, 1994, the California Supreme Court summarily denied the second petition for review without comment or citation to case authority. [*Id.*, Ex. I at 343.]

As a result of the order to show cause, the state superior court held an evidentiary hearing beginning in March 1996 to resolve seven of the 23 issues it had been directed to resolve. [*See id.*, Ex. J at 392-393.] On July 12, 1996, the state superior court issued an order denying the habeas petition. [*Id.*, Ex. J at 391-428.]

On March 20, 1997, Petitioner filed a habeas petition in the California Court of Appeal.[4/] On January 15, 1998, the state court of appeal filed a 13-page order denying the petition. [*Id.*, Ex. K at 429-442.] Thereafter, on January 23, 1998, Petitioner filed a petition for review in the California Supreme Court ("third petition for review"), asserting that various errors had occurred in the evidentiary hearing. [*Id.*, Ex. L at 444-509.] The third petition also challenged the evidentiary hearing court's refusal to address claims raised in a supplemental habeas petition and challenged the State's legal standard as applied by the lower courts in reviewing Petitioner's habeas claims. [*See id.*] On April 15, 1998, the California Supreme Court summarily denied the third petition for review without comment or citation to case authority. [*Id.*, Ex. L at 443.]

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4. Only a portion of the apparently voluminous March 20, 1997 habeas petition has been presented to this Court. [*See* Petitioner's Lodgment # 1 (containing Volume 3 of his March 20, 1997 habeas petition), filed herein on October 26, 1998.]

III. Discussion

A. Exhaustion Standard

Respondent primarily contends that the First Amended Petition should be dismissed because it is a mixed petition containing both exhausted and unexhausted claims. [Motion at 21-71.]

A federal court will not grant a state prisoner's petition for writ of habeas corpus unless it appears the prisoner has exhausted available state remedies. 28 U.S.C. § 2254 (b) & (c); *Duncan v. Henry*, 513 U.S. 364, 365-366, 115 S.Ct. 887, 130 L.Ed.2d 865, *rag. denied*, 514 U.S. 1032, 115 S.C. 1344, 131 L.Ed.2d 245 (1995). Exhaustion requires that the petitioner's claims be fairly presented to the highest court of the state. *Duncan v. Henry*, 513 U.S. at 365-366. A claim is fairly presented if the state prisoner has described in the state court proceedings *both* the operative facts and the federal legal theory on which his federal habeas claim is based. *Id.; Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982).

Furthermore, federal courts are expressly prohibited from *granting* a petition for writ of habeas corpus unless

> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the appellant.

28 U.S.C. § 2254 (a) (1).[5/]

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5. However, "[an application for a writ of habeas corpus may be *denied* on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254 (b) (2)

Respondent's contentions concerning each of the allegedly unexhausted claims are discussed below on a claim-by-claim basis.

B. Analysis of Challenged Claims

1. Ground 1

Petitioner contends that his federal due process rights under the Fourteenth Amendment were violated by the trial court's failure to give an unanimity instruction on the robbery allegation in light of the two qualifying acts, taking Levin's credit cards and taking the $1.5 million check. [First Amended Petition at 6.] Respondent asserts that ground 1 is not exhausted because Petitioner raised the claim only in broad terms in a footnote in his first petition for review on direct appeal without specifying that the claim related to the robbery charge. [*See* Motion at 27-30.]

The claim was presented to the California Supreme Court as follows: "Erroneous jury instructions rendered the trial fundamentally unfair, including . . . c) lack of unanimity instruction, thereby infringing on appellant's right to a unanimous verdict (People v. Dietrich (1982) 31 Cal.3d 263, 280-281) . . . ." [*Id.*, Ex. H at 341 n. 36 (3) (c).] The issue had been addressed by the California Court of Appeal in relation to the robbery charge, but without mention of a federal constitutional provision. [*See id.*, Ex. E at 267-268.] Similarly, the case cited by Petitioner, *Dietrich*, does not discuss the failure to give a unanimity instruction as a federal constitutional deprivation. Accordingly, because Petitioner failed to present the federal legal theory associated with ground 1 to the California Supreme Court, this claim is not exhausted.

(emphasis supplied).

2. Ground 2

Petitioner contends that his Sixth Amendment right to a fair and impartial jury was violated by a juror's distribution of a "recipe of the week" to other jurors. [First Amended Petition at 6-7; First Amended MP&A at 44-47.] Respondent asserts that this claim was not exhausted. [Motion at 31-34.]

Both the facts and legal theory of ground 2 were presented to the California Supreme Court in Petitioner's second petition for review.[6] [*See id.*, Ex. I at 376-377.] The claim was also raised in Petitioner's first petition for review as "prejudicially denying [his] right to a fair and impartial jury trial. (*McDonough Power Equipment, Inc. v. Greenwood* (1982) 464 U.S. 530, 556; U.S. Const., Sixth amend. . . .)." [*Id.*, Ex. H at 333 & n.29.] It is of no moment here that a portion of the claim was presented in a footnote, since presentation of the claim is all that is required for purposes of exhaustion. Accordingly, ground 2 is exhausted.[7]

3. Grounds 3 (1) and 3 (2)

In grounds 3 (1) and 3 (2), Petitioner contends that his Fifth Amendment privilege against self-incrimination was violated two ways: first, when the trial court's and the prosecutor's actions emphasized Petitioner's assertion of his *Miranda* rights during a custodial interview, and, second, when

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6. Although Respondent is correct in asserting that the second petition for review sought to expand the issues adjudicated in the Court of Appeal's order to show cause, the second petition for review nonetheless discussed both the facts and legal theories associated with many of Petitioner's claims and required consideration of the merits of the claims to determine whether the requested relief should be granted.

7. In a footnote cross-referencing ground 2, Respondent contends that ground 9 (11) is also unexhausted to the extent that it is based on ground 2. [Motion at 31 n.8.] Having determined that ground 2 is exhausted, the magistrate judge further concludes that ground 9 (11) is similarly exhausted.

the prosecutor argued in rebuttal that certain evidence, statements and actions of Petitioner were not explained by defense counsel. [First Amended Petition at 7.] Respondent contends these claims are not exhausted. [Motion at 35-37.]

Petitioner raised both claims in a footnote in his first petition for review as follows:

> 1. Counsel's defalcations, combined with the court's pointed questioning of Detective Zoller about appellant's decision to ask for legal counsel, denied appellant his constitutional rights under Doyle v. Ohio (1976) 426 U.S. 610 and its progency.
>
> . . .
>
> 4. The prosecutor's repeated reference to appellant's failure to testify through the ruse of attacking alleged deficiencies of appellant's attorney's closing argument violated appellant's rights under Griffin v. California (1965) 380 U.S. 609, 615 and its progency.

[Motion, Ex. H at 341 n.36.]

Both claims plainly reference the relevant facts and federal legal theories now being asserted in grounds 3 (1) and 3 (2) of the pending First Amended Petition; therefore, the claims are exhausted.

4. Ground 5 (1)

In ground 5 (1), Petitioner contends that his Fourteenth Amendment right to due process was violated because the trial judge was biased against defense attorney Chier, which caused the judge to limit Chier's role during the trial, and that the bias arose, in part, from an extrajudicial source. [First Amended

Petition at 9; First Amended MP&A at 1-24.] Petitioner further asserts that "[t]he extrajudicial roots of the trial judge's bias against defense counsel Chier are described in Exhibits 103 and 106." [First Amended MP&A at 1.] Exhibits 103 and 106 asserts facts concerning several encounters between Chier and the trial judge before Petitioner's trial which resulted in the trial judge's intense dislike for Chier. [*See* Exhibits Offered in Support of Memorandum of Points and Authorities for Petition ("Exhibits"), Volume # 6, Exs. 103 (Declaration of Richard Chier) and 106 (Declaration of Donald R. Wager), filed herein on June 30, 1998.]

Respondent essentially concedes that the general nature of the claim was raised in Petitioner's first petition for review on direct appeal as a violation of Petitioner's federal due process right and his right to the effective assistance of counsel, but argues that some of the specific facts now being asserted were never presented to the state supreme court. [*See* Motion at 37-39.] In particular, Respondent contends that Petitioner failed to exhaust the following factual assertions: (1) that Barens was unprepared for trial, (2) that the trial judge had formed an opinion of Chier long before trial began, (3) that the trial judge's view that Chier had antagonized jurors during *Hovey* voir dire was inaccurate, and (4) that the appellate court's finding that the trial judge held Barens in high esteem was not well founded. [*Id.* at 37-38 (citing First Amended MP&A at 5 n.1-3, 6-7, 11-140, 17-20).]

Although Petitioner raised a judicial bias claim in both of his first and second petitions for review, he failed to allege the specific facts noted above in connection with the claims. [*See* Motion, Ex. H at 315-316, 319, 322 & n.12, 327 & Ex. I at 373-375.] Similarly, neither Exhibit 103 nor 106, nor any of facts asserted therein, was presented to the California Supreme Court. Consequently, because ground 5 (1) relies on newly-asserted facts of an "extrajudicial source" of the trial judge's

bias, this claim is not exhausted.[8/]

5. Ground 5 (2)

In ground 5 (2), Petitioner contends that his due process rights were violated by the trial judge's pro-prosecution bias. [First Amended Petition at 9; First Amended MP&A at 47-50.]

Respondent contends that the following factual assertions are not exhausted: (1) the trial judge threatened defense counsel with contempt, (2) the trial judge gave an improper instruction on the court's role, (3) the trial judge referred to Levin in the past tense and to the case as a "murder," (4) the trial judge questioned witness Steve Lopez to show that Petitioner's statement that he was kidding around when he said he killed Levin was "stupid" and unbelievable, and (5) the trial judge made inappropriate facial gestures during the testimony of Lynne Roberts and Brooke Roberts which were observed by a juror. [Motion at 39-40.]

None of the factual assertions noted above were referred to in petitioner's state petitions. Although Petitioner referred to the trial judge's "pejorative gestures" in his first and second petitions for review, he did not specifically connect such gestures with the testimony of Lynne Roberts and Brooke Roberts as he seeks to do now. [*See id.*, Ex. H at 318 & Ex. I at 373.]

Petitioner argues that because the trial record is replete with instances of bias that it was unnecessary, and virtually impossible, for him to cite them all in his petition to the California Supreme Court. [Opposition I at 86-87.] Petitioner further argues that these facts were "fairly included" in his

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8. Respondent purposely refrained from challenging various of Petitioner's Exhibits as unexhausted due the burden associated with reviewing the voluminous exhibits and in light of the possibility that the Motion might be granted. [Motion at 25 n.4.] Respondent, however, expressly reserved the right to raise the issue of exhaustion as it relates to the exhibits in the future. [*Id.*]

petition by reference to the opening brief he filed in the California Court of Appeal and supplemental claims petition to the California Court of Appeal. [*Id.* at 88 n.33.]

"California Rule of Court 28 expressly prohibits the incorporation by reference of authorities or arguments from another document." *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999). Rule 28 (e) (5) provides, in pertinent part, that "[t]he petition shall be a single document [,] . . . [and that] [n]o authorities or argument may be incorporated by reference from another document into the petition." Rule 28 (e) (5), Cal. Rules Sup.Ct. & Cts. of Appeal.

Petitioner points out that, in regard to the third petition for review, he specifically moved the California Supreme Court to waive "any technical insufficiencies" noted in the petition. [Supplemental Brief at 1-2.] Thus, Petitioner argues, it must be presumed that his application was granted, and that the California Supreme Court waived compliance with Rule 28 (e) (5) since his petition was not returned by the court as defective. [*Id.* at 4-5.]

Respondent contends that Petitioner's argument is nonsensical since it would permit a petitioner "blithely to ignore any and all procedural rules simply by asking to do so." [Supplemental Reply at 2-3.]

Although this latest argument is limited to the claims incorporated by reference to Petitioner's appellate briefs in his third petition for review, it is, in any event, misplaced. As the *Gatlin* court stated, "[w]hile the consistency of a state court's enforcement of its procedural rules is relevant in determining whether a petitioner has procedurally defaulted his claim, . . . it is irrelevant in this context, which pertains to the distinct question whether [the petitioner] has exhausted his state court remedies." *Gatlin v. Madding*, 189 F.3d at 888-889. Absent an order or decision expressly waiving compliance with Rule 28 (e) (5), this Court will not presume that the California Supreme Court considered any issue of law or fact incorporated by reference in any of the three state petitions for review.

Accordingly, because some of the factual bases now being asserted in support of ground 5 (2) were not presented to the California Supreme Court, the claim is not exhausted.

6. Ground 5 (4)

In ground 5 (4), Petitioner contends that his due process rights were violated by the "media circus" in the courtroom during the trial. [First Amended Petition at 9.]

Petitioner raised this issue in his first petition for review on direct appeal as follows: "Repeated violations of rules covering courtroom filming violated appellant's constitutional right to a trial in a sober, dignified environment." [Motion, Ex. H at 341 n.36 (5).] In addition, Petitioner cited two Supreme Court cases, *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981) and *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct.1507, 16 L.Ed.2d 600 (1966), both of which relate to the prejudicial impact on a defendant's constitutional right to a fair trial occasioned by media coverage of their criminal trials. [*See id.*]

Despite the cases cited and Petitioner's reference to his constitutional rights, Respondent characterizes the claim raised in state court as merely challenging "the violation of state rules regarding filming in court." [Motion at 41.] The magistrate judge disagrees and finds that ground 5 (4) is exhausted.

7. Ground 5 (6)

In ground 5 (6), Petitioner contends that his due process rights were violated by the prosecutor's comments during closing argument about Petitioner's failure to present evidence of a search for Levin in Arizona. [First Amended Petition at 10.]

In his first state petition for review, Petitioner contended that prejudicial federal constitutional error occurred based upon "the prosecutor's reference to appellant's failure to put on

evidence of a search for Levin in Arizona was misconduct which rendered the trial fundamentally unfair." [Motion, Ex. H at 341 n.36 (4).] Petitioner also cited *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), in support of this claim. [*Id.*]

Respondent argues that the citation to *McGuire* was inadequate to put the California Supreme Court on notice as to the federal legal theory underlying Petitioner's claim. [Motion at 42.] As Respondent correctly points out, *McGuire* involved a due process challenge to a jury instruction, not prosecutorial misconduct. In contrast, Petitioner raised his claim in the first petition for review in conjunction with his Fifth Amendment claim of *Griffin* error, and it was only discussed in the context of *Griffin* on direct appeal in the California Court of Appeal's opinion. [*See id.*, Ex. H at 341 n.36 (4); *see also id.*, Ex. E at 242-244.] Since Petitioner did not cite the Fourteenth Amendment, nor any federal law relating to *prosecutorial misconduct* in support of the claim in his first petition for review, ground 5 (6) is not exhausted.

8. Ground 5 (8)

In ground 5 (8), Petitioner contends that his Fourteenth Amendment due process rights were violated because the California Court of Appeal used his extrajudicial statement (Trial Exhibit 55) in 1993 to uphold the corpus delecti finding with respect to the robbery allegation in violation of state law. [First Amended Petition at 10.]

In his first petition for review, Petitioner claims, as a subsidiary of his contention that use of the statement created a conflict in state law, that "the appellate court's finding of corpus delecti and use of the statement in support of the corpus delecti was such a marked deviation from evidentiary principles as to violate appellant's right to fundamentally fair application of state evidentiary rules." [Motion, Ex. H at 340.] Following this assertion was a citation to *Estelle v. McGuire*, 502 U.S. 62,

112 S.Ct. 475, 116 L.Ed.2d 385 (1991). [*Id.*, Ex. H at 340-341.]

Respondent asserts the claim is not exhausted and contends that "[t]he citation to *Estelle* would have given the state supreme court no meaningful guidance as to the basis for [Petitioner's] federal constitutional claim." [Motion at 43-44.] To the contrary, *McGuire* is noted for the principle that a state evidentiary ruling may violate a defendant's federal due process right if the ruling was so prejudicial that it rendered the proceedings arbitrary and fundamentally unfair. *See Estelle v. McGuire*, 502 U.S. at 68. This plainly appears to be the crux of Petitioner's federal claim. Accordingly, ground 5 (8) is exhausted.

9. Ground 7 (2)

In ground 7 (2), Petitioner contends that his Sixth Amendment right to the effective assistance of counsel was violated by a conflict of interest created by the terms of defense counsel Barens' appointment to represent Petitioner. [First Amended Petition at 10-11.] Petitioner asserts numerous factual bases in support of this claim in 11 subclaims denoted as 7 (2) (i) through 7 (2) (xi). [*See id.*; *see also* First Amended MP&A at 25-33.]

Respondent contends that the following factual bases now being asserted in support of ground 7 (2) were not presented to the California Supreme Court: (1) Barens told Chier that he was motivated by greed, (2) Barens was wealthy and perjured himself regarding payments received from Petitioner, (3) Barens postponed work on the defense case until the People rested, (4) Barens believed good cause existed to disqualify the trial judge for bias, and (5) Barens did not work as hard as he claimed. [Motion at 45.]

Petitioner asserts that the factual bases for his "cash for silence" conflict of interest claim are exhausted because they were presented in his appellate briefs and petitions. [*See*

Opposition I at 95-97.] However, none of his petitions for review to the California Supreme Court set forth the factual allegations noted above in connection with a conflict of interest claim. As previously concluded by the magistrate judge, Petitioner's mere reference to briefs and/or petitions filed in the lower courts was inadequate to exhaust the operative facts and legal theories associated with his claims. Accordingly, the facts concerning Barens' alleged greed, wealth, perjury, postponement of work, and belief that good cause existed to disqualify the trial judge (described in the First Amended Petition as grounds 7 (2) (ii), (iii), (vii), and (viii)), were not exhausted. In the event Petitioner elects to file a second amended petition, he may reallege ground 7 (2) only if he omits any reference to the unexhausted operative facts noted herein.

10. Ground 7 (3)

In ground 7 (3), Petitioner contends that his Sixth Amendment right to the effective assistance of counsel was violated by a conflict of interest that arose after Barens was publicly accused of plotting to procure witnesses who would claim to have seen Levin alive and was thereafter inhibited from investigating or presenting legitimate witnesses who claimed to have seen Levin. [First Amended Petition at 11; First Amended MP&A at 34-37.]

Respondent contends that Petitioner failed to raise this claim in his petitions to the California Supreme Court, and Petitioner's related claim in his third petition for review was raised in a different context. [Motion at 47.]

Petitioner's third petition for review essentially raised a due process challenge to the state court's refusal to grant Petitioner a hearing on his supplemental habeas claims, the exclusion of evidence at the state evidentiary hearing, and the findings and conclusions of the lower courts following the evidentiary hearing. [*See* Motion, Ex. L at 444-509.] In challenging the standard of review applied by the lower court to

his conflict of interest claim, Petitioner stated only that "Barens withheld from [other members of the defense team] his knowledge of 5 eyewitness reports that Levin was alive. . . ." [*Id.*, Ex. L at 495.]

Even if the Court were to construe the third petition for review as raising the same legal theory asserted in ground 7 (3), pointedly, Petitioner failed to set forth the operative facts he now asserts for Baren's failure to divulge the existence of such witnesses. Accordingly, ground 7 (3) is not exhausted.

11. Ground 7 (4)

In ground 7 (4), Petitioner contends that he received ineffective assistance of counsel based on a conflict of interest arising out of the trial judge's threats and sanctions against defense counsel in "revenge" for counsel's assertions of judicial bias and misconduct. [First Amended Petition at 11-12.] Petitioner further contends that the trial judge's conduct violated Petitioner's due process rights. [*Id.* at 12.]

Respondent contends that the facts asserted in support of this claim were previously asserted by Petitioner in the context of a judicial bias claim, but not in support of a conflict of interest claim and, therefore, ground 7 (4) is not exhausted. [Motion at 47-48.]

Petitioner contends that the facts were raised and exhausted in his state court petitions. [Opposition at 102-103.] The reduction in Chier's hourly rate was raised in connection with Petitioner's conflict of interest claim in the first petition for review. [Motion, Ex. H at 329 n.23.] However, Petitioner misses the point; none of the other key facts now being asserted by him -- that Chier was threatened with ejection from the courtroom and threatened with contempt, or that payment to both attorneys was withheld from November 1986 to May 1987, or that Chier was told that he would not be paid for work done on the subject of misconduct -- were presented to the California Supreme Court in connection with Petitioner's conflict of

interest claim.

A claim has not been fairly presented if facts alleged in federal court fundamentally alter the nature of the claim that was presented to the state's highest court. *See Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994); *see also Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). Furthermore, the federal habeas claim may not be supported by additional facts that put the claim in a significantly different and stronger evidentiary posture from the claim that was presented to the state court. *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988) (per curiam) (internal citations and quotations omitted). The additional facts that were not asserted in state court alter the strength of Petitioner's conflict of interest claim. Accordingly, ground 7 (4) is not exhausted.

12. Grounds 9 (1) - 9 (48)

In grounds 9 (1) through 9 (48), Petitioner asserts 48 separate groups of factual bases in support of his claim that defense counsel Barens rendered ineffective assistance in violation of Petitioner's Sixth Amendment rights. [*See* First Amended Petition at 12-13.] In his first petition for review, Petitioner made several assertions contending that defense counsel rendered ineffective assistance. [Motion, Ex. H at 19-20.] Petitioner also raised an ineffective assistance of counsel claim in his second petition for review. [*Id.*, Ex. I at 363-368.]

Respondent contends that many of the factual bases now being asserted in support of ground 9 were not presented to the California Supreme Court in connection with the ineffective assistance of counsel claim presented there. [*Id.* at 48-69.] Each of the challenged sub-claims are discussed below.

a. Ground 9 (1)

In ground 9 (1), Petitioner makes the broad and general allegation that Barens failed to manage the case, to investigate and interview witnesses, and to develop impeachment materials.

[First Amended Petition at 12-13.] This general claim was exhausted in Petitioner's first and second petitions for review. [*See* Motion, Ex. H at 330-331 & Ex. I at 363-368.]

b. Ground 9 (2)

In ground 9 (2), Petitioner contends that Barens failed to maintain a litigation file or to otherwise systematically prepare; which resulted in poor cross-examination, lost impeachment opportunities, and a stunted defense case. [First Amended Petition at 13.] Petitioner failed to assert these facts in his petitions to the California Supreme Court, and, therefore, ground 9 (2) is not exhausted.

c. Ground 9 (3)

In ground 9 (3), Petitioner contends that Barens failed to assist Chier in trying to overturn the limitations on Chier's role during the trial. [First Amended Petition at 13.] This allegation was not raised in any of the petitions for review to the California Supreme Court. Accordingly, ground 9 (3) is not exhausted.

d. Grounds 9 (6) and 9 (7)

In ground 9 (6), Petitioner contends that he was prejudiced by Barens' failure to make a record of the trial judge's nonverbal misconduct, and in ground 9 (7), he further contends that Barens failed to object to the trial judge's verbal misconduct. [First Amended Petition at 13.] Both grounds 9 (6) and 9 (7) were presented to the California Supreme Court and are exhausted. [*See* Motion, Ex. H at 331 & Ex. I at 367.]

e. Ground 9 (9)

In ground 9 (9), Petitioner contends that Barens "fail[ed] to request a limiting instruction concerning Pitman's post 6-18-

84 statements (CALJIC 6.24) that the alleged conspiracy ended when the $1.5 million check bounced." [First Amended Petition at 14.] In his first petition for review, Petitioner asserted that Barens "fail[ed] to request CALJIC limiting instruction 6.24 with regard to the extrajudicial statements of Pitman (AOB 189-190)."[9/] [Motion, Ex. H at 331.] In his second petition for review, the claim was raised in an even more cursory fashion as a "failure to request limiting instructions." [*Id.*, Ex. I at 367.]

The issue of Pitman's statements was addressed by the California Court of Appeal in the context of whether defense counsel should have requested an instruction to limit the use of Pitman's statements. [Motion, Ex. E at 175-179.] The court explained that the instruction "would have precluded the jury from considering any statements made by Pitman unless the jury found the existence of a conspiracy and that such statements were made in the course of the conspiracy." [*Id.*, Ex. E at 175.]

To the extent Petitioner's claim, as raised here and in the California Supreme Court in his first petition for review, challenges the failure to request the limiting instruction, it is exhausted, since the more specific factual assertion as to a particular statement by Pitman does not alter the fundamental nature of the claim. *See Chacon v. Wood, supra*, 36 F.3d at 1468; *see also Vasquez v. Hillery, supra*, 474 U.S. at 260. Accordingly, ground 9 (9) is exhausted.

f. Ground 9 (12)

In ground 9 (12), Petitioner cites various examples in contending that Baren's performance was deficient in cross-examining witnesses Dicker, Raymond, May and Karney. [First Amended Petition at 14-15.] Respondent asserts that this claim

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9. As previously concluded, Petitioner's reference to his appellate brief was not adequate to exhaust the specific facts now being asserted.

was not raised in any of the petitions for review to the California Supreme Court. [Motion at 52.] Having reviewed the petitions and Petitioner's opposing papers, the magistrate judge agrees with Respondent and concludes that ground 9 (12) is not exhausted.

g. Ground 9 (13) and 9 (14)

In ground 9 (13), Petitioner contends that Barens failed to impeach Tom May with Deputy Durbin's report, and in ground 9 (14), Petitioner contends that Barens failed to impeach Tom May and Jeff Raymond with Officer Rosenbraugh's report. [First Amended Petition at 15.] The two reports are set forth in Petitioner's Exhibits 129 and 130. [*See* Exhibits Volume # 6, filed on June 30, 1998.]

Petitioner contends that the claims were part of his "supplemental claims" raised in his March 20, 1997 habeas petition to the California Court of Appeal. [Opposition I at 112.] He also makes a general contention that the claims were presented to the California Supreme Court in his third petition for review. [*Id.*] However, Petitioner failed to point out any specific reference to the reports in his third petition for review and the Court has found none. Accordingly, because the facts associated with grounds 9 (13) and 9 (14), including Petitioner's Exhibits 129 and 130, were not presented to the California Supreme Court, the claims are not exhausted.

h. Ground 9 (15)

In ground 9 (15), Petitioner contends that Barens failed to impeach Tom May, and by extension Raymond and Dicker, with evidence of a movie deal to show that May had a strong financial interest in Petitioner's conviction and was concerned about his own reputation. [First Amended Petition at 15.] In his second petition for review, Petitioner asserted that Barens was ineffective for failing to investigate and discover evidence about May's movie deal. [*See* Motion, Ex. I at 365.] However,

Petitioner did not allege any facts about Raymond or Dicker in regard to a movie deal. Thus, ground 9 (15) plainly is not exhausted as to these latter witnesses.

Respondent argues that the claim is not exhausted in any sense because Petitioner's petition for review did not contest the failure to impeach May, but focused instead on the failure to discover evidence of May's movie deal. [Motion at 54.] Petitioner asserts that Respondent "attempts to split the same hair," and appears to contend that the failure to impeach May with the movie deal indicates that Petitioner was prejudiced by the failure to discover that the movie deal even existed. [Opposition I at 113 n.50.]

A failure to investigate or discover a fact implies a failure to use such fact to an accused's benefit at trial. Because the factual basis underlying ground 9 (15) does not fundamentally alter the nature of Petitioner's claim -- that Barens should have used evidence of May's movie deal at trial to show May's possible bias against Petitioner -- the claim is exhausted, but only as it relates to May. Accordingly, if Petitioner elects to file a second amended petition reasserting this claim, he should omit any reference to Raymond and Dicker.

i. Grounds 9 (16), 9 (17) and 9 (18)

In ground 9 (16), Petitioner contends that Barens failed to investigate Browning's claims about his academic achievements and titles and that Barens failed to impeach Browning with the "true record."[10/] [First Amended Petition at 15-16.] In ground 9 (17), Petitioner asserts that Barens failed to impeach Browning in regard to his claim that he owned $600,000 of BBC attrition mills, and in ground 9 (18), Petitioner claims that

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10. Gene Browning, inventor of the cyclotron, apparently testified during the evidentiary hearing as part of an attempt by Petitioner to show that the BBC was involved in negotiations over the sale of $200 million of cyclotron attrition mill technology at the time of Levin's disappearance. [*See* Motion, Ex. J at 413-414.]

Barens failed to impeach Browning with evidence disproving his assertions that he had obtained a $1.6 million judgment against Petitioner. [*Id.* at 16.]

In his first petition for review, Petitioner contended that defense counsel failed to impeach Browning with his inconsistent preliminary hearing testimony in regard to his statement at trial that Petitioner said Levin was missing and "probably dead." [Motion, Ex. H at 330 n.24.] That claim is currently raised in the pending First Amended Petition as ground 9 (19).[11/] In his second petition for review, Petitioner simply contended that counsel was ineffective for "fail[ing] to impeach . . . Browning with prior testimony and statements (CT 132; RT 8203; CT 372-373, 406.)" [*Id.*, Ex. I at 367.] The lack of any specificity in Petitioner's claim to the state supreme court about what particular prior statements should have been used to impeach Browning renders grounds 9 (16), 9 (17) and 9 (18) unexhausted.

j. Ground 9 (20)

In ground 9 (20), Petitioner contends that Barens failed to use the "Eisenberg Tape" to impeach Eisenberg and corroborate Brooke Robert's testimony. [First Amended Petition at 16.] In his second petition for review, Petitioner argued that defense counsel failed to impeach Eisenberg with evidence of his participation in a car theft ring. [Motion, Ex. I at 358, 365.]

Respondent contends that the claim is not exhausted since it is not clear whether the "Eisenberg Tape" constitutes evidence of Eisenberg's involvement in a car theft ring. [*Id.* at 57.] After reviewing Petitioner's Exhibits 114 and 115, it appears that the pending allegation essentially involves the same facts asserted in state court. Accordingly, ground 9 (20) is exhausted.

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11. Respondent does not contend that ground 9 (19) is unexhausted.

k. Ground 9 (21)

In ground 9 (21), Petitioner contends that Barens failed to show that Karney and Dicker discussed their stories and made a "mutual cooperation pact" before going to police. [First Amended Petition at 16.] In his second petition for review, Petitioner contended that defense counsel failed to discover "Dicker's collusion with Karney" and cited two exhibits which were apparently attached to the petition. [Motion, Ex. I at 365.] One of those exhibits, Exhibit 15-I, was filed in this Court in Petitioner's exhibits Volume # 5.[12/] Exhibit 15-I is a transcript of Karney's testimony in a different proceeding where he discusses talking to Dicker about going to the police. Accordingly, ground 9 (21) is exhausted.

l. Ground 9 (22)

In ground 9 (22), Petitioner contends that Barens failed to present evidence of forensic tests done on the BMW's trunk carpet. [First Amended Petition at 17.] Respondent contends that these facts were asserted in the California Supreme Court under a different legal theory. [Motion at 58.]

In his second petition for review, Petitioner noted that the facts about the laboratory tests on the trunk carpet had been considered below in connection with his ineffective assistance of counsel claim and argued that the evidence "should also have been considered as evidence tending to undermine the People's case after Petitioner's threshold showing of innocence." [*Id.*, Ex. I at 359.] Accordingly, because the legal theory now being associated with the trunk carpet tests is different than that asserted in the state supreme court, ground 9 (22) is not exhausted.

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12. Neither the Court nor Respondent was provided with a copy of Petitioner's Exhibit 15-G, which is the other exhibit cited in support of ground 9 (21). [*See* Motion at 58 n. 18.]

m. Ground 9 (23)

In ground 9 (23), Petitioner contends that Barens failed to impeach Karney with four specific inconsistent statements provided in discovery. [First Amended Petition at 17.] Petitioner asserted somewhat similar claims in his first and second petitions for review, but without reference to any of the four specific statements upon which his pending claim rests. [*See* Motion, Ex. H at 330 & n.24 & Ex. I at 358-359, 365, 367.] Accordingly, ground 9 (23) is not exhausted.

n. Ground 9 (24)

In ground 9 (24), Petitioner contends that Barens was aware of and failed to impeach Karney with his perjurious "1983 Cantor deposition." [First Amended Petition at 17.] In his second petition for review, Petitioner raised the issue of Karney's deposition testimony in a wholly different context. Petitioner contended that, in addition to considering the evidence on the issue of ineffective assistance of counsel, the appellate court should have broadened the order to show cause to consider Karney's deposition testimony as "other" evidence tending to establish Petitioner's innocence. [*See* Motion, Ex. I at 359.] Accordingly, because Petitioner failed to raise the facts in state court in conjunction with the legal theory now being asserted in this Court, 9 (24) is not exhausted.

o. Ground 9 (25)

In ground 9 (25), Petitioner contends that Barens failed to question John Riley and Len Marmor and thereby obtain proof that Pitman had contact with Levin before June 6, 1984. [First Amended Petition at 17.]

In the introduction to his first petition for review, Petitioner stated "habeas evidence showed that two individuals -- including a prosecution witness in the trial below -- could place Levin and Pitman together before Levin's demise."

[Motion, Ex. H at 315.] These particular facts were not otherwise raised in connection with any legal theory to state a claim. Petitioner asserted similar facts in his second petition for review in connection with his contention that such evidence was "improperly excluded from the category of 'new evidence' in the OSC. . . ." [*Id.*, Ex. I at 360-261.]

Accordingly, because the facts associated with 9 (25) were not raised in the state supreme court in conjunction with the legal theory now being asserted, the claim is not exhausted.

p. Ground 9 (26)

In ground 9 (26), Petitioner contends that Barens failed to call Verplancke of Progressive Savings and Loan as a witness to show that Levin had previously asserted that he was a venture capitalist working on BBC's milling project. [First Amended Petition at 17-18.] Petitioner failed to asset these facts in support of an ineffective assistance of counsel claim in any of his three petitions for review. Accordingly, 9 (26) is not exhausted.

q. Grounds 9 (27) and 9 (28)

In ground 9 (27), Petitioner contends that Barens failed to call Karen Marmor, Levin's neighbor, to testify about seeing the "to do" list on Levin's desk and about being told by Levin that he was going to New York and might never return. [First Amended Petition at 18.] In 9 (28), Petitioner contends that Barens failed to present evidence contradicting the prosecution's evidence of a close relationship between Levin and his family. [*Id.*]

Petitioner asserted similar facts in his second petition for review, but only in the context of his claim that the order to show cause should have been expanded to include consideration of "other" evidence of his innocence. [Motion, Ex. I at 360, 371.] Accordingly, because the legal theory associated with the factual bases asserted in grounds 9 (27) and 9 (28) was not

presented to the state supreme court in conjunction with these facts, the claims are not exhausted.

r. Ground 9 (29)

In ground 9 (29), Petitioner contends that Barens failed to call Dr. Avery to testify that Levin cheated Dr. Avery out of $1 million and told Dr. Avery about being raped in jail. [First Amended Petition at 19.]

In Petitioner's second petition for review, he contended that Barens failed to discover evidence of "Avery's testimony re Levin's debts" and "Avery's testimony re Levin's fear of returning to prison." [*See* Motion, Ex. I at 365.] While the latter allegation is arguably sufficiently similar to Petitioner's current assertion about Levin's vow not to return to jail, the non-specific reference to Levin's "debts" plainly was not sufficient to exhaust the assertion that Avery was cheated out of $1 million by Levin. Accordingly, ground 9 (29) is not exhausted.

s. Ground 9 (30) and 9 (31)

In ground 9 (30), Petitioner contends that Barens failed to present evidence through tax attorney John Hayes of Levin's fear of arrest for tax crimes and of his abrupt discontinuation of efforts to resolve his tax debts shortly before June 6, 1984. [First Amended Petition at 19.] In ground 9 (31), Petitioner contends that Barens also failed to call John Martin to show that Levin knew he was being investigated for defrauding insurance companies out of $500,000. [*Id.*]

Respondent contends that these claims are not exhausted since neither witness' name was mentioned in any of the three petitions for review. [Motion at 63.] The magistrate judge has reviewed each of the petitions for review and found no specific reference to witnesses John Hayes or John Martin in connection with Petitioner's ineffective assistance of counsel claims. Accordingly, grounds 9 (30) and 9 (31) are not exhausted.

t. Ground 9 (32)

In ground 9 (32), Petitioner contends that Barens failed to call Detective Edholm to testify about Levin's theft and conversion of property worth several hundred thousand dollars. [First Amended Petition at 19.] The second petition for review made no mention of theft or conversion, but merely asserted that Barens was ineffective for failing to discover evidence of Edholm's knowledge about Levin's debt. [Motion, Ex. I at 365.] Accordingly, because Petitioner now asserts facts which were not presented to the state supreme court, ground 9 (32) is not exhausted.

u. Grounds 9 (33) and 9 (34)

In ground 9 (33), Petitioner contends that Barens failed to call Jeffrey Melczer to show that Levin knew an FBI investigation regarding Progressive Savings and Loan was underway, that Levin claimed to own an option purportedly transferred to his father, and that Levin's father did not mention the "to do" list to Melczer. [First Amended Petition at 19.] In ground 9 (34), Petitioner contends that Barens failed to offer other available evidence to show Levin's awareness of the FBI investigation into Progressive Savings and Loan. [*Id.* at 19-20.]

In his second petition for review, Petitioner contended that Barens failed to discover evidence of "Martin Levin's testimony re the conspicuous scattering of the seven page 'receipt for murder[.]'" [Motion, Ex. I at 365.] Petitioner did not mention Melczer in regard to the "to do" list of the Progressive Savings and Loan investigation. Similarly, Petitioner failed to allege that Barens did not offer other available evidence to show Levin's awareness of the investigation in support of his ineffective assistance of counsel claims in any of his petitions for review to the California Supreme Court.[13/] Accordingly,

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13. In his second petition for review, Petitioner only contended that

grounds 9 (33) and 9 (34) are not exhausted.

v. Ground 9 (35)

In ground 9 (35), Petitioner contends that Barens failed to present evidence of "the magnitude of Levin's pre-disappearance illicit income and indebtedness." [First Amended Petition at 20.]

In his second petition for review, Petitioner contended that Levin's indebtedness created a motive for him to disappear and was evidence supporting Petitioner's innocence. [Motion, Ex. I at 358, 360 & n.8.] Petitioner also contended that counsel was ineffective for failing to present "Edholm's and Avery's testimony re Levin's debts." [*Id.*, Ex. I at 365.] However, Petitioner did not challenge, as he now does, Barens' performance on the basis that he failed to present evidence of Levin's "illicit income." Accordingly, ground 9 (35) is not exhausted.

w. Ground 9 (36)

In ground 9 (36), Petitioner contends that Barens failed to call Oliver Holmes to show that Levin planned to flee to avoid prosecution. [First Amended Petition at 20.]

In his first petition for review, Petitioner mentioned Holmes in the introduction, but did not assert any facts involving Holmes in support of an ineffective assistance of counsel claim. [*See* Motion, Ex. H at 313.] In his second petition for review, Petitioner mentioned Holmes in connection with Levin's plan to flee as evidence supporting Petitioner's claim of innocence, but these facts were not asserted to show Barens rendered ineffective assistance of counsel. [*See id.*, Ex.

"the FBI's investigation of Levin's Progressive Savings involvement and liability for $153,000 bank fraud" should have been considered along with other evidence tending to establish Petitioner's innocence. [Motion, Ex. I at 359-360.]

I at 360.] Accordingly, ground 9 (36) is not exhausted.

x. Ground 9 (37)

In ground 9 (37), Petitioner contends that Barens should have called John Duran, Levin's barber, to testify that Levin had asked for directions on dyeing his hair. [First Amended Petition at 20.]

In the introduction to his first petition for review, Petitioner mentioned that Levin's hairdresser gave Levin instructions on how to dye his hair at home, but Petitioner failed to assert these facts in support of an ineffective assistance of counsel claim. [*See* Motion, Ex. H at 314.] In his second petition for review, Petitioner only asserted the hair-dyeing facts as additional evidence of his innocence. [*See id.*, Ex. I at 360.] Accordingly, ground 9 (37) is not exhausted.

v. Ground 9 (38)

In ground 9 (38), Petitioner contends that Barens failed to elicit testimony from Martin Levin, similar to his preliminary hearing testimony, about finding the "to do" list strewn across Levin's office floor. [First Amended Petition at 20-21.]

In his second petition for review, Petitioner contend that counsel was ineffective for failing to discover "Martin Levin's testimony re the conspicuous scattering of the seven page 'recipe for murder' . . . ." [Motion, Ex. I at 365..] After reviewing page 4 of Petitioner's Exhibit 204, it appears that the facts now being asserted are the same facts that were asserted in the second petition for review. [*See* Exhibits Volume #7, Ex. 204.] Accordingly, ground 9 (38) is exhausted.

z. Ground 9 (39)

In ground 9 (39), Petitioner contends that Barens failed to sufficiently question John Reeves to show that Levin's American Express card transaction actually occurred on June 7,

1984, rather than on May 7, 1984 as Reeves speculated. [First Amended Petition at 21.] Petitioner did not assert these facts in any of his petitions for review, and ground 9 (39) is not exhausted.

aa. Ground 9 (40)

In ground 9 (40), Petitioner contends that Barens failed to discover evidence showing Levin's "penchant for athletics." [First Amended Petition at 21.] Petitioner made a similar assertion in his second petition for review wherein he contended that counsel was ineffective for failing to discover evidence of "Levin's use of an athletic facility to support evidence of Levin's post June 6, 1984 viability." [Motion, Ex. I at 365.] Accordingly, ground 9 (40) is exhausted.

bb. Ground 9 (41), 9 (42) and 9 (43)

In ground 9 (41), Petitioner contends that Barens failed to call a "Levin-sighting" witness, Louise Waller, to testify during the guilt phase of the trial. [First Amended Petition at 21.] In ground 9 (42), Petitioner similarly contends that Barens failed to call Robinson as a witness, and, in ground 9 (43), Petitioner contends that Barens failed to present evidence of Robinson's sighting of Levin as well as sightings by Ivan Werner, Nadia Ghaleb and "Nippers" in connection with a motion for new trial. [*Id.* at 21-22.]

Respondent contends that Petitioner failed to mention "Nippers" in any of the petitions for review and that Petitioner discussed the other witnesses in an entirely different context in his third petition for review. [Motion at 66-67.] Since the third petition for review did not assert an ineffective assistance of counsel claim and these witnesses are not mentioned in either of the earlier petitions, grounds 9 (41), 9 (42) and 9 (43) are not exhausted.

cc. Ground 9 (44)

In ground 9 (44), Petitioner contends that Barens failed to corroborate Brooke Roberts' testimony by questioning Tom May and Jeff Raymond about "Tom's 'trash can notes' of a plan to steal the BBC's attrition mills." [First Amended Petition at 22.] In his second petition for review, Petitioner contended that defense counsel was ineffective for failing to discover "the May brother's trash can notes re their plan to trash the BBC." [Motion, Ex. I at 365.] Thus, ground 9 (44) is exhausted.

dd. Grounds 9 (45) and 9 (46)

In ground 9 (45), Petitioner contends that Barens failed to present evidence via witnesses Casson, Frank Vassalo, and the limousine driver to show that Pitman used his own name during his Plaza Hotel limousine trips in New York. [First Amended Petition at 22.] In ground 9 (46), Petitioner further contends that Barens failed to present evidence of Pittman's outstanding Virginia warrants to explain his resistance to being detained by hotel personnel in New York. [*Id.*]

In support of his ineffective assistance of counsel claim in his second petition for review, Petitioner asserted that defense counsel failed to discover evidence of "Pittman's conspicuous visit to New York and his outstanding Virginia arrest warrants." [Motion, Ex. I at 365.] The reference to Pittman's "conspicuous" visit was not sufficiently specific to exhaust the particular facts now being asserted in support of ground 9 (45), and this claim is not exhausted. However, Petitioner's explicit reference to Pittman's outstanding warrants adequately exhausted the facts now being asserted in support of ground 9 (46).

ee. Ground 9 (47)

In ground 9 (47), Petitioner contends that Barens failed to call Eddie Cano to establish at what time La Scala restaurant

stopped serving take-out food. [First Amended Petition at 22-23.] Petitioner failed to assert this claim in any of his petitions for review, and, therefore, ground 9 (47) is not exhausted.

ff. Ground 9 (48)

In ground 9 (48), Petitioner contends that Barens failed to call Neil Adelman to testify about Petitioner's belief in May and June 1984 that multi-million dollar payments would be forthcoming from the Kilpatrick/VFOI deal. [First Amended Petition at 23.]

In his second petition for review, Petitioner contended that "former BBC attorney Neil Adelman's testimony that Hunt reasonably believed up to $220 million was about to come in from BBC cyclotron sales, evidence that defeated the inference he was desperate for money in June 1984," was improperly excluded from the order to show cause as it constituted "other" evidence tending to establish Petitioner's innocence. [Motion, Ex. I at 359.] Since these facts were not raised in conjunction with Petitioner's ineffective assistance of counsel claim, ground 9 (48) is not exhausted.

13. Ground 10

In ground 10, Petitioner contends that his Sixth Amendment right to the effective assistance of counsel was violated "by the degree of Barens' moral turpitude, apathy, and incompetence. . . ." [First Amended Petition at 23-24.] In addition to relying on the facts asserted in support of grounds 7 (2), 7 (3), 7 (5), 8 and 9, some of which have been found to be unexhausted, Petitioner further asserts that Barens had a reputation for self-dealing and dishonesty, that he billed the County for expenses Petitioner had already paid, and that other members of the defense team wished to resign because of Barens' behavior. [*Id.* at 24.]

In his third petition for review, Petitioner argued that his due process rights were violated because the evidentiary hearing

court refused to hear evidence offered to rebut the presumption of deference applied to Barens' tactical choices. [*See* Motion, Ex. L at 478-480.] Although Petitioner asserted similar facts as to Barens' "character for self-dealing" and "dishonesty," the claim asserted in state court did not directly challenge Barens' performance at trial as does the pending claim. Accordingly, ground 10 is not exhausted.

D. Availability of State Court Remedies

Respondent asserts that Petitioner may still be able to exhaust his unexhausted claims by filing a petition for writ of habeas corpus in the California Supreme Court provided that Petitioner can adequately explain and justify his delay in raising the claims. [Motion at 71-72.]

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of [28 U.S.C. § 2254], if he has the right under the law of the State to raise, by an available procedure, the question presented." 28 U.S.C. § 2254(c). "Section 2254(c) directs federal courts to consider whether a habeas petitioner has 'the right under the law of the State to raise, by any available procedure, the question presented.'" *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1728, 1734, 144 L.Ed.2d 1 (1999). "The exhaustion doctrine, in other words, turns on an inquiry into what procedures are 'available' under state law." *Id.* A petitioner must present his claims to the state supreme court even if that court's review is discretionary. *Id.* at - - -, 119 S.Ct. at 1732-1733.

Petitioner contends that state remedies are no longer available for him to exhaust because he cannot explain and justify his failure to raise the claims in his earlier petitions and that "[i]t would be pathetic to even try." [Opposition I at 1-3.] Respondent asserts that, if Petitioner is correct, then he has forfeited those claims and is absolutely barred from obtaining review of their merits here. [Reply at 10.]

As in *O'Sullivan* where review by the Illinois Supreme

Court was found to be discretionary, so is review by the California Supreme Court. *See* Cal.R.Ct. 29.2(a) (the court "may review and decide any or all issues in the cause"). Because California's "'established, normal appellate review procedure is a two-tiered system,'" state prisoners are required to exhaust their claims in a petition for review to the California Supreme Court. *Gatlin v. Madding, supra*, 189 F.3d at 888 (citing *O'Sullivan v. Boerckel*, 526 U.S. at - - -, 119, S.Ct. at 1732 & Cal.R.Ct. 28(b)).

Petitioner argues that he "cannot be faulted for any insufficiency of his presentation of any of the federal grounds that he reasonably believed to be barred by Rule 29(a)." [Opposition III at 11.] To the contrary, *O'Sullivan* now makes clear that as long as a state prisoner had the opportunity to raise the claims, but failed to do so, the claims will not be deemed exhausted.[14/] *Cf. Swoopes v. Sublett*, - - - F.3d - - -, 1999 WL 988250 (9th Cir. (Ariz.), Nov. 2, 1999) (holding that post-conviction review before the Arizona Supreme Court is unavailable within the meaning of *O'Sullivan* where the State of Arizona has expressly "declared that its 'complete round' [of the appellate review process] does not include discretionary review before the Arizona Supreme Court"). This is particularly true in this case, since some of Petitioner's unexhausted claims could have been raised in the California Supreme Court in a petition for writ of habeas corpus.

Because Petitioner failed to exhaust some of his claims, and because he failed to show that there was an absence of an

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14. If Petitioner has correctly assessed his chances of obtaining review of the merits of any future habeas petition he might file in the California Supreme Court, then his failure to exhaust his state remedies arguably has resulted in a *de facto* procedural default of the unexhausted claims. However, the application of any such anticipated procedural bar to the unexhausted claims at this time would be premature, since a procedural default involves the application of a state procedural rule barring review of the merits of defectively presented claims. For obvious reasons, Petitioner's unexhausted claims cannot be viewed as defectively presented since they were never presented to the state's highest court in the first instance.

available state corrective process, this Court is precluded from reviewing the merits of Petitioner's unexhausted claims. Generally, "[a] district court must dismiss habeas corpus petitions containing both exhausted and unexhausted claims." *Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1988); *Rose v. Lundy*, 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). However, a petitioner may, as an alternative to dismissal, "amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims." *Rose v. Lundy*, 455 U.S. at 520.

Accordingly, unless Petitioner elects to move for leave to file a Second Amended Petition containing only exhausted claims, this Court will be required to dismiss the entire action without prejudice.[15/]

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15. The magistrate judge expresses no opinion as to whether Petitioner is entitled to relief on the unexhausted claims. Petitioner risks forfeiture of the unexhausted claims under 28 U.S.C. § 2244 (governing second or successive petitions) and Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts (governing abuse of the writ) if he elects to file a Second Amended Petition containing only exhausted claims and later attempts to file a second federal habeas action after exhausting his state remedies.

It is further noted that dismissal of the pending action without prejudice will not result in a subsequent petition being dismissed as a successive petition under 28 U.S.C. § 2244(b). *See In re Turner*, 101 F.3d 1323 (9th Cir. 1997), *as amended*. However, such a dismissal could result in application of the statute of limitations under 28 U.S.C. § 2244(d) (l) to bar review of any later-filed federal habeas petition. *See Sperling v. White*, 30 F. Supp.2d 1246, 1253 (C.D. Cal. 1998) (the time during which a prior habeas petition was pending in the federal district court does not toll the limitations period); *Jones v. Morton*, - - -F.3d - - -, 1999 WL 970797 (3rd Cir. (N.J.), Oct. 25, 1999) (same); *see also Dictado v. Durcharme*, 189 F.3d 889 (9th Cir. 1999) (tolling during state collateral review is not available if a state petition is denied for procedural reasons since such petition would not be considered to have been "properly filed").

E. Procedural Default

Respondent makes an additional argument that Petitioner procedurally defaulted grounds 2, 5 (1), and 7 (2) because he failed to raise the claims to the California Supreme Court on direct appeal. [Motion at 73-81.] Petitioner contends that the claims are not procedurally defaulted. [Opposition I at 73-74, 81-83, 101-102, 118-121.]

In the order to show cause, the California Court of Appeal, citing *In re Jackson*, 3 Cal.4th 578, 586 n.2 (1992) and *In re Waltreus*, 62 Cal.2d 218, 225 (1965), denied some of Petitioner's claims because Petitioner's habeas claims had been raised and rejected on appeal.[16] [*See* Motion, Ex. F at 296.] The claims deemed to procedurally defaulted were listed as follows:

> (1) that defendant was deprived of the effective assistance of counsel due to (a) the court imposed limitations on cocounsel, Richard Chier; (b) a conflict of interest by lead counsel, Arthur Barens, allegedly caused by the financial arrangements imposed by the court; (c) failure to disclose said financial arrangement to cocounsel and defendant; (d) counsel's alleged failure to fulfill promises made in his opening statement; (e) counsel's elicitation of defendant's requests for counsel; (f) counsel's alleged failure to object to gestures and other judicial misconduct; (g) failure to impeach witnesses, Karny and Gene Browning, with prior testimony and statements; (h) failure to request limiting instructions;

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16. Because Petitioner's second petition for review to the California Supreme Court was denied without comment or citation to case authority, the last "reasoned" decision of the claims which Respondent contends were procedurally defaulted was the preceding decision of the state court of appeal. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991).

> (i) failure to renew his request for a hearing regarding a juror's misconduct; (j) failure to make evidentiary objections; and (k) failure to request a continuance prior to trial; (2) allegations of judicial bias and misconduct; (3) juror Linda Mickell's alleged misconduct; and (4) the court's refusal to order disclosure of Karny's state bar application.

[Id., Ex. F. at 296-297.]

The California Supreme Court has explained that "[b]y citing *Waltreus* in our summary denial orders, we have intended to communicate that because the issue was previously raised and rejected on direct appeal, and because petitioner does not allege sufficient justification for the issue's renewal on habeas corpus, the issue is procedurally barred from being raised again." *In re Harris*, 5 Cal.4th 813, 825, 21 Cal.Rptr.2d 373, 377 (1993), *as modified* (footnote omitted). By citing *Waltreus* in Petitioner's case, the California Supreme Court was clearly indicating that Petitioner failed to provide sufficient justification for it to reconsider the merits of claims which had already been considered and rejected on direct appeal.[17/]

Generally, a citation to *Waltreus* alone is inadequate to bar federal review. *See Forrest v. Vasquez*, 75 F.3d 562, 564 (9th Cir.), *cert. denied*, 519 U.S. 832, 117 S.C. 101, 136 LED.2d 55 (1996) ("a *Waltreus* citation is neither a ruling on the merits nor a denial on procedural grounds") (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 805, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991)). "[F]ederal courts 'look through' a denial based on *Waltreus* to previous state court decisions." *Id.* (citing *Ylst v. Nunnemaker*,

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17. In addition to *Waltreus*, the state court of appeal cited *Jackson*, which cites *Waltreus* for the principle that certain of the claims were being denied on the ground they were raised and rejected on appeal. . . ." *In re Jackson*, 3 Cal.4th 578, 585 n.2, 11 Cal.Rptr.2d 531 (1992), *as modified on denial of r'hg, cert. denied sub. nom, Jackson v. California*, 508 U.S. 941, 113 S.Ct. 2419, 124 L.Ed.2d 641 (1993).

501 U.S. at 805-806).

In *Forrest*, the Ninth Circuit looked through a *Waltreus* citation denying a habeas petition to the state supreme court's prior unexplained order denying the petitioner's application for relief from default after he failed to meet the time requirements for filing a petition for review under Rule 28(b) of the California Rules of Court. *Forrest v. Vasquez, supra*, 75 F.3d at 563-564. The court found that the "nature" and "surrounding circumstances" of the unexplained order denying relief from the default clearly showed the basis of the decision was procedural default. *Id.* at 564. The court determined that it would not look past the state supreme court's unexplained order denying the petitioner's application for relief from default since the reason for the denial was obviously procedural. *Id.*

Respondent contends that Petitioner's presentation of grounds 2, 5 (1), and 7 (2) is analogous to *Forrest*. [Motion at 76-81.] Ground 2, which challenges a juror's distribution of a "recipe of the week" to other jurors, was raised in both the first and second petitions for review. [*See* Motion, Ex. H. at 333 n.29 & Ex. I at 376-377.] Because Petitioner did not omit the claim from his petition to the California Supreme Court on direct appeal, the reasoning of *Forrest* does not apply, and ground 2 is not procedurally defaulted.

Similarly, the exhausted portion of ground 5 (1) was raised by Petitioner to the California Supreme Court on direct appeal in his first petition for review. [*Id.*, Ex. H at 315-316, 319, 322 & n.12, 327 & n.20.] Accordingly, in the event Petitioner files a second amended petition omitting the unexhausted facts currently asserted as part of ground 5 (1), the Court will not be precluded from reviewing the merits of this claim.

Petitioner also raised a conflict of interest claim in his first petition for review, albeit without reference to many of the facts now asserted as part of ground 7 (2). [*See id.*, Ex. H at 328-330.] Accordingly, in the event Petitioner files a second amended petition omitting the unexhausted facts currently asserted as part of ground 7 (2), the Court will not be precluded from reviewing the merits of this claim.

Furthermore, even if the challenged claims had not been raised in the first petition for review, federal habeas review of the claims would not be precluded. As Petitioner argues, in light of the California Supreme Court's decision in *In re Robbins*, 18 Cal.4th 770, 77 Cal.Rptr.2d 153 (1998), *r'hg denied*, the citation to *Waltreus* did not necessarily constitute an independent state ground, since before *Robbins*, the California Supreme Court would consider the merits of a federal constitutional claim under a "fundamental constitutional error" exception before applying a procedural bar to claims that were or should have been raised on direct appeal. [*See* Opposition I at 82, 118-119.] Thus, as the Ninth Circuit recently explained, because the California Supreme Court's citation of the such procedural rules to deny a habeas claim involved an antecedent determination of federal law, it was not an independent basis for denying review and did not amount to a procedural bar. *Park v. California*, 164 F.3d 1226, 1230-1232 (9th Cir. 1999).

F. Failure to State a Federal Claim

Respondent argues that grounds 11, 12 and 13 should be dismissed because errors in state post-conviction proceedings are not cognizable in federal habeas proceedings. [Motion at 81-87.]

In ground 11, Petitioner challenges the state court's application of California's "new evidence of innocence habeas remedy" as violating the Fourteenth Amendment. [First Amended Petition at 24.] In ground 12, Petitioner contends that his rights under the Fourteenth Amendment were violated during the state evidentiary hearing when the hearing judge refused to consider "the proffered testimony or declarations of jurors from petitioner's 1992 trial in San Mateo County. . . ." [*Id.* at 25.] In ground 13, Petitioner similarly contends that his constitutional rights were violated when his request to represent himself during the evidentiary hearing was denied. [*Id.*]

Petitioner wisely "concedes respondent's argument." [Opposition I at 121.] It is well settled that alleged procedural

errors in the state post-conviction review process, and even the refusal to appoint counsel, are not redressable through habeas corpus proceedings. *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir.), *cert. denied sub. nom, Franzen v. Deeds,* 493 U.S. 1012, 110 S.Ct. 574, 107 L.Ed.2d 569 (1989); *Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998), *cert. denied*, - - - U.S. - - -, 119 S.Ct. 1777, 143 L.Ed.2d 806 (1999); *see also Pennsylvania v. Finley*, 481 U.S. 551, 556-559, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) (right to counsel does not extend to collateral post-conviction proceedings). Accordingly, if Petitioner elects to file a second amended petition, grounds 11, 12, and 13 must be omitted.

III. Conclusion and Order Re Further Proceedings.

For the foregoing reasons, IT IS ORDERED:

1. If Petitioner wishes to proceed with this matter, he shall have until **December 17, 1999** (1) to file a Motion for Leave to File a Second Amended Petition along with a Proposed Second Amended Petition containing only exhausted claims consistent with this Memorandum and Order OR (2) to file a Request for Voluntary Dismissal of the Action Without Prejudice Pursuant to Fed.R.Civ.P. 41 (a)(1)(i).

2. If Petitioner elects to file a Motion for Leave to File a Second Amended Petition, the Proposed Second Amended Petition shall be labeled as "Proposed Second Amended Petition" and with the case number CV 98-5280-WDK (AN).

The Proposed Second Amended Petition must be separate, complete, and independent document; it must not refer to the First Amended Petition or any attachments or previously filed papers and must be understandable without looking at the previously filed petitions. In other words, Petitioner must start over as if the prior petitions had never been written. Petitioner may, however, refer to his previously filed Exhibit Volumes # 1 through # 7 to the extent that any exhibit referred to in the Proposed Second Amended Petition has been exhausted in the

California Supreme Court in connection with the same claim.

The Proposed Second Amended Petition shall be submitted on the petition forms approved by and supplied without charge by the Clerk's office, as required by Local Rule 26.1 of the Local Rules for the United States District Court for the Central District of California. The Proposed Second Amended Petition may be handwritten; however, it must be single-sided, consecutively paginated, and **shall not exceed 50 pages.** The Clerk of the Court shall forward a copy of the petition forms approved by this Court along with a copy of this Memorandum and Order to Petitioner.

Petitioner is advised and warned that his failure to timely file a Motion for Leave to File a Second Amended Petition and Proposed Second Amended Petition or a timely Request for Voluntary Dismissal by December 17, 1999, shall be construed as either his consent to dismissal of the action for failure to prosecute or the disobedience with a Court Order warranting the dismissal of the action with prejudice pursuant to Fed.R.Civ.P. 41(b).

Dated: November 19, 1999

/s_____
ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE

cc: JUDGE KELLER
All Parties

APPENDIX D

FILED
JUL 20 2000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

JOSEPH HUNT,	) CV 98-5280-WDK (AN)
	)
Petitioner,	) ORDER RE PETITIONER'S
v.	) OBJECTIONS TO
	) MEMORANDUM AND
CAL TERHUNE,	) ORDER DISMISSING FIRST
DIRECTOR OF CDC, et al.,	) AMENDED PETITION WITH
	) LEAVE TO AMEND
Respondents.	)
	)

Petitioner's "Objections to 'Memorandum and Order' of November 22, 1999, [etc.]," filed December 20, 1999, is treated as timely objections under Rule 72, F.R.Civ.P., to the magistrate judge's non-dispositive Memorandum and Order Re Respondent's Motion to Dismiss the First Amended Petition ("M&O"), filed November 22, 1999. Petitioner's Objections are reserved and are subject to further review by the United States District Judge assigned to this case.

To the extent that Petitioner contends that the "new" facts being asserted on behalf of ground 5 (2), ground 9 (23), and ground 9 (29) were included in his first or second petitions for review to the California Supreme Court by reference to specific pages of the trial transcript, it is possible that the factual bases supporting these grounds may be exhausted. Consequently, if it is Petitioner's contention that he can restate the factual bases supporting grounds 5 (2), 9 (23), and 9 (29) by referencing the same trial transcript pages in an amended petition, he should be permitted to do so. However, the magistrate judge is not

persuaded to modify his findings by any of the other arguments set forth in Petitioner's Objections.

Accordingly, if Petitioner wishes to proceed in this matter, he shall have until **August 18, 2000**, to file a Motion for Leave to File a Second Amended Petition along with a Proposed Second Amended Petition complying with the magistrate judge's November 22, 1999 M&O and this Order.

Petitioner may stand on his First Amended Petition; however, if he elects to do so, Petitioner is advised that the case cannot proceed further since it is based on a mixed petition containing both exhausted and unexhausted claims. If a Proposed Second Amended Petition is not lodged within the time permitted by this Order, the magistrate judge will recommend to the district judge that the First Amended Petition be dismissed without prejudice as a mixed petition without further notice.

IT IS SO ORDERED.

DATED: July 19, 2000

s/_____

ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

FILED
9/14/00

FAX
9/18/00

ENTER ON ICMS
SEP 18 2000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 98-5280-WDK (AN)

Title: **JOSEPH HUNT v. CAL TERHUNE, DIRECTOR OF THE CDC, et al.**

DOCKET ENTRY

PRESENT: **HON. ARTHUR NAKAZATO, U.S. MAGISTRATE JUDGE**

Melissa Cash	None
Deputy Clerk	Court Reporter

MINUTE ORDER
(In Chambers - No Appearances)

PROCEEDINGS: 1. Petitioner's Application to Vacate Magistrate Orders of 11-22-99 and 7-20-00 in Light of Order of the California Supreme Court, etc., filed September 8, 2000

2. Petitioner's Application for Leave to File a Supplement to the First Amended Memorandum of Points and Authorities in Support of the First Amended Petition, filed September 8, 2000

Petitioner's Application to Vacate Magistrate's Orders of 11-22-99 and 7-20-00 in Light of Order of the California Supreme Court's August 9, 2000 decision denying Petitioner's habeas petition is **DENIED**. Under well settled Ninth Circuit law, "'[t]he appropriate time to assess whether a prisoner has exhausted his state remedies is when the federal habeas petition is filed. . . .'" *Gatlin v. Madding,* 189 F.3d 882, 889 (9th Cir. 1999), *cert. denied,* --- U.S. ---, 120 S.Ct. 815, 145 L.Ed.2d 686 (2000) (quoting *Brown v. Maass,* 11 F.3d 914, 915 (9th Cir. 1993)). Thus, Petitioner's assertion that he exhausted his unexhausted claims by presenting them to the California Supreme Court subsequent to commencing this action is irrelevant to this Court's prior determination that the First Amended Petition contains unexhausted claims.

Accordingly, Petitioner's Application for Leave to File a Supplement to the First Amended Memorandum of Points and Authorities in Support of the First Amended Petition is also **DENIED**. Petitioner is reminded that he has until **October 2, 2000** to file a Motion for Leave to File a Second Amended Petition and lodge a Proposed Second Amended Petition. Petitioner is advised that this deadline will be strictly enforced.

IT IS SO ORDERED.

cc: JUDGE KELLER
All Parties

Initials of Deputy Clerk s/ Mc

APPENDIX F

FILED
DEC 19 2000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSEPH HUNT, Petitioner, v. CAL TERHUNE, DIRECTOR OF THE CDC, Respondent.	)	Case No. CV 98-5280-WDK (AN) MEMORANDUM AND ORDER DENYING PETITIONER'S REQUEST TO VACATE MAGISTRATE JUDGE'S SEPTEMBER 14, 2000 MINUTE ORDER

Before the Court are Petitioner's Objections to the Magistrate Judge's September 14, 2000 Minute Order, filed October 5, 2000. Although Petitioner is proceeding *pro se* in this action, the face page of his Objections shows that he is being assisted by Attorney Eric S. Multhaup. Mr. Multhaup signed the proof of service showing that the Objections were mailed by Mr. Multhaup from his business address in Mill Valley, California, on October 4, 2000. Accordingly, the prison mailbox rule does not apply, and Petitioner's Objections were not timely filed. *See* F.R.Civ.P. 72(a) (party has 10 days after service to file objections to magistrate judge's nondispositive order).

Nonetheless, having reviewed Petitioner's Objections, the magistrate judge's September 14, 2000 Minute Order, and the two Applications filed by Petitioner on September 8, 2000, the Court finds that Petitioner's arguments are not persuasive. Petitioner filed his First Amended Petition herein on August 31, 1998, and he cannot rely on a later-filed state habeas petition to exhaust claims that were not exhausted at the time his federal petition was filed. *See Gatlin v. Madding*, 189 F.3d 882, 889 (9th Cir. 1999), *cert. denied*, --- U.S. ---, 120 S.Ct. 815, 145 L.Ed.2d 686 (2000); *Brown v. Maass*, 11 F.3d 914, 195 (9th Cir. 1993).

Petitioner's contention the California Supreme Court's case citations in its August 9, 2000 decision denying Petitioner's latest state habeas petition means that his claims were exhausted at the time that the First Amended Petition was filed is not availing. "The law of this circuit is plainly that a federal claim has not been exhausted in state court unless the petitioner both raised the claim in state court and explicitly indicated then that the claim was a federal one -- regardless of whether the petitioner was proceeding pro se." *Lyons v. Crawford*, --- F.3d ---, 2000 WL 1687808, *2 (9th Cir. (Nev.), Nov. 13, 2000). In addition, to be considered exhausted, the petitioner's claims must actually have been presented to the state's highest court, and not merely incorporated by reference to authorities or arguments made before a lower court. *See Gatlin v. Madding*, 189 F.3d at 888; *see also James v. Giles*, 221 F.3d 1074, 1077 n.3 (9th Cir. 2000).

Accordingly, Petitioner's request to vacate the magistrate judge's September 14, 2000 Minute Order is **DENIED**. Petitioner shall have until **January 15, 2001**, to file a Motion for Leave to File a Second Amended Petition and lodge a Proposed Second Amended Petition in compliance with the magistrate judge's previous orders.

IT IS SO ORDERED.

DATED: 12/18, 2000

s/_____
WILLIAM D. KELLER
UNITED STATES DISTRICT JUDGE

Presented on November 14, 2000 by:

s/_____
ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

FILED
JAN 31 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSEPH HUNT, Petitioner, v. CAL TERHUNE, DIRECTOR OF THE CDC, Respondent.	)	Case No. CV 98-5280-WDK (AN) ORDER DENYING PETITIONER'S APPLICATION TO FILE PROPOSED SECOND AMENDED PETITION

I. Procedural Background

This action has been pending since June 30, 1998, when Joseph Hunt ("Petitioner") filed his original Petition for Writ of Habeas Corpus. On August 31, 1998, Petitioner filed a First Amended Petition for Writ of Habeas Corpus ("First Amended Petition") and a First Amended Memorandum of Points and Authorities.

On April 15, 1999, Respondent filed a Motion to Dismiss the First Amended Petition ("Motion") contending that many of Petitioner's claims were not exhausted. Petitioner filed several papers opposing dismissal and the Court also allowed him to file supplemental briefs. After considering the parties' papers and reviewing the record, the magistrate judge found that some of the challenged claims were not exhausted. [*See*

Memorandum and Order Re Respondent's Motion to Dismiss the First Amended Petition, filed on November 22, 1999 ("M&O).] Rather than recommending that the First Amended Petition be dismissed outright as a mixed petition, the magistrate judge offered Petitioner the option of amending the First Amended Petition to delete the unexhausted claims. [*Id.* at 46-47.] To select this option, Petitioner was ordered to file a Motion for Leave to File a Second Amended Petition and to lodge a Proposed Second Amended Petition not later than December 17, 1999. [*Id.*]

Instead of promptly complying with the Court's instructions, Petitioner spent much of the ensuing year filing papers seeking either to overturn the M&O, to supplement the First Amended Petition, or to extend the deadline for lodging a Proposed Second Amended Petition. All but one of Petitioner's papers lacked merit and unnecessarily delayed the proceedings by several months.

On September 8, 2000, Petitioner filed an application seeking to vacate the M&O and the July 20, 2000 order.[1/] In his application, Petitioner contended that all of the claims raised in his First Amended Petition had been presented to the California Supreme Court in a habeas petition that was filed on February 23, 2000, and subsequently denied on August 9, 2000. The magistrate judge denied Petitioner's application pursuant to *Gatlin v. Madding*, 189 F.3d 882, 889 (9th Cir. 1999), *cert. denied*, 528 U.S. 1087, 120 S.Ct. 815, 145 L.Ed.2d 686 (2000), and *Brown v. Maass*, 11 F.3d 914, 915 (9th Cir. 1999), which provide that the appropriate time to assess whether a prisoner has exhausted his state remedies is when the federal habeas petition is filed. [*See* Civil Minutes Order, filed September 14,

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1. Based on Petitioner's Objections t the M&O, filed December 20, 1999, the magistrate judge modified his findings as to grounds 5 (2), 9 (23), and 9 (29) to permit Petitioner to restate the factual bases supporting these grounds consistent with the way he stated them in his first or second petition for review to the California Supreme Court. [*See* Order Re Petitioner's Objections to Memorandum and Order, etc., filed July 20, 2000.]

2000.]

Petitioner filed untimely objections to the September 14, 2000 Minute Order which the district judge still considered, but ultimately rejected. [*See* Memorandum and Order Denying Petitioner's Request to Vacate Magistrate Judge's September 14, 2000 Minute Order, filed December 19, 2000.] Additionally, the district judge *sua sponte* granted Petitioner an extension of time until January 16, 2001, to file a Motion for Leave to File a Second Amended Petition and lodge a Proposed Second Amended Petition in compliance with the magistrate judge's previous orders. [*Id.* at 2-3.]

On January 18, 2001, Petitioner filed his Application in Support of the Filing and Consideration on the Merits of the Second Amended Petition ("Application") and lodged a "'Proposed' Second Amended Petition."[2/] Petitioner explains that the Proposed Second Amended Petition "includes all the Ground of the First Amended Petition, less Ground 9 (2) and plus Grounds 7 (15) and 14 through 24. . . ." [Application at i.] Anticipating that the Court may not order that the Proposed Second Amended Petition be filed, Petitioner also lodged a proposed "Third Amended Petition" which he contends complies with the Court's previous orders instructing Petitioner to delete his unexhausted claims.

II. DISCUSSION

Although the Proposed Second Amended Petition purportedly includes all but one of the claims previously found to be unexhausted and raises 12 new claims never previously raised in this Court, Petitioner contends it should be filed because all of its claims have been presented to the California Supreme Court and are now exhausted. Petitioner further contends that Rule 15, Fed.R.Civ.P., and the Ninth's Circuit's

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2. Petitioner's Application is timely under the mailbox rule. *See Houston v. Lack*, 487 U.S. 266, 267, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988).

recent decision in *Anthony v. Cambra*, --- F.3d ---, 2000 WL 1838960 (9th Cir. (Cal.), Dec. 15, 2000), require the Court to file the Proposed Second Amended Petition and review the merits of each asserted claim. Petitioner also contends the addition of 12 new claims does not render his Proposed Second Amended Petition a successive petition.

In *Anthony v. Cambra*, two of the three judges assigned to the case on appeal to the Ninth Circuit decided the district court erred by failing to consider the merits of five of the petitioner's claims that were not exhausted when the petition was filed but ultimately became exhausted a few months after the filing date. *Anthony v. Cambra*, 2000 WL 1838960, *8. In contrast, this Court has relied on earlier Ninth Circuit cases by other three judge panels for the principle that "[the appropriate time to assess whether a prisoner has exhausted his state remedies is when the federal habeas petition is filed, not when it comes on for a hearing in the district court or court of appeals." *Brown v. Maass*, 11 F.3d 914, 915 (9th Cir. 1993); *Gatlin v. Madding*, 189 F.3d 882, 889 (9th Cir. 1999) (citing *Brown*).

These earlier opinions are in keeping with the long established principle that requires prisoners to exhaust their state habeas remedies *before* coming to the federal district court to further the policy of comity and to avoid piecemeal litigation. *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). "[S]trict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition."[3] *Id.* at 520.

Even assuming that all of the claims in the Proposed Second Amended Petition have now been exhausted, nothing in *Anthony* compels this Court to change course midstream and

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3. Petitioner contends that the Supreme Court did not intend to foreclose review of unexhausted claims presented in a mixed petition under *Rose*. [Application at 13.] However, by retaining the exhaustion requirement and creating a one-year statute of limitations, Congress certainly foresaw this as a possible result.

decide to review the merits of claims that were not exhausted at the time that the original Petition was filed in 1998. First and foremost, *Anthony* does not cite or discuss, much less overturn, the earlier cases previously relied on by this Court. It is well settled that "one Ninth Circuit panel cannot overrule another; only an *en banc* court can overrule the prior panel decision, at least in the absence of a change in controlling authority." *Palmer v. University Medical Group*, 994 F.Supp. 1221, 1232 (D.Or. 1998) (citation omitted); *see also United States v. Garza*, 980 F.2d 546, 555 (9th Cir. 1992); *Jeffries v. Wood*, 114 F.3d 1484, 1492 (9th Cir.), *cert. denied*, 522 U.S. 1008, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997) ("Only an en banc panel may overturn existing Ninth Circuit precedent.").

Second, the procedural circumstances in *Anthony* are readily distinguishable from this case. Anthony filed his federal habeas petition containing one exhausted claim and five unexhausted claims on April 23, 1997. *Anthony v. Cambra*, 2000 WL 1838960, *2. Two days before that, Anthony delivered to prison officials for mailing a state habeas petition containing the unexhausted claims that was subsequently filed in the California Supreme Court on April 25, 1997. *Id.* The district court dismissed Anthony's federal habeas petition outright without offering Anthony the option of amending the petition to delete the unexhausted claims. *Id.*

On June 13, 1997, Anthony filed another federal habeas petition containing only the one exhausted claim. *Id.* The district court construed this latter petition as amending the earlier dismissed petition and eventually granted Anthony's motion to stay the amended petition while he exhausted his other five claims in state court. *Id.* The motion to stay the proceedings had apparently slipped through the cracks as it was not granted until September 23, 1997; ironically, both the parties and the court were unaware that the California Supreme Court had previously denied Anthony's state habeas petition on July 30, 1997. *Id.* at *7. Anthony eventually moved to amend the petition again to add back his newly exhausted claims, but the district court denied his motion to amend under abuse of the

writ principles. *Id.*

The Ninth Circuit reversed this decision after concluding that amending the petition to add back the newly exhausted claims was not an abuse of the writ because Anthony had initially raised the claims in his original petition. *Id.* at *8. The Ninth Circuit further concluded that it was within the district court's discretion to allow Anthony to amend the petition under Fed.R.Civ.P. 15("Rule 15"). *Id.* The court specifically noted that amendment under Rule 15(a) was appropriate in Anthony's case because there was no evidence of any undue delay attributable to Anthony. *Id.*

The facts of *Anthony* are in sharp contrast to those in this case. Here, Petitioner was anything but diligent in his efforts to exhaust his unexhausted claims. In his papers opposing Respondent's Motion to Dismiss the First Amended Petition, Petitioner contended that all of his claims had been exhausted. Petitioner further contended that, even if some of his claims were not exhausted, they should nonetheless be considered on the merits because state remedies were no longer available for him to exhaust since he could not explain or justify his failure to raise the claims sooner, and that "[i]t would be pathetic to even try." [Opposition to Respondent's Motion to Dismiss at 1-3, filed May 24, 1999.]

It was not until three months *after* this Court issued the M&O offering Petitioner the option to submit an amended petition deleting his unexhausted claims that Petitioner first sought review of his unexhausted claims in the California Supreme Court by filing a state habeas petition.[4] [*See* Application at 16-17.] By the time the California Supreme Court denied the petition, the First Amended Petition had been pending in the Court for two years.

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4. Petitioner contends that the limitations period did not expire until nine and a half months after this action commenced. [*See* Application at 10 & n.4, 12-13.] By his own calculations, the statute of limitations expired well before he filed his state habeas petition in the California Supreme Court and the statutory tolling provision no longer applied.

Rule 15(a) provides, in pertinent part, as follows:

> A party may amend the party's pleading once a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

"In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). As the *Anthony* court acknowledged, "had Anthony, without explanation, waited several years, or even several months before filing his proposed amendment, it might well have been within the district court's discretion to deny leave to amend under Rule 15(a)." *Anthony v. Cambra*, 2000 WL 1838960, *8. Consequently, it is well within this Court's discretion to deny Petitioner's Application.

Furthermore, permitting a federal habeas petitioner to amend his petition to add claims or otherwise obtain review of claims that were not exhausted until well after the limitations period expired would be tantamount to tolling the limitations period while only the federal habeas petition was pending, something Congress did not intend under 28 U.S.C. § 2244(d)(2).[5/] *See Jiminez v. Rice*, 222 F.3d 1210, 1213-1214 (9th Cir. 2000). The timing of Petitioner's efforts to exhaust his claims in state court is particularly relevant in relation to the 12

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5. The Supreme Court's decision in *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), does not compel a different result since that case did not involve the presentation of claims that were exhausted after the limitations period expired.

new claims he is asserting in the Proposed Second Amended Petition.

Last, but not least, by coterminously lodging the Proposed Second Amended Petition and Proposed Third Amended Petition, Petitioner has presented the Court with an equivocal response to the Court's previous orders directing him to make an election on how he wishes to proceed based on the Court's conclusion that the First Amended Petition constitutes a mixed petition. Accordingly, unless Petitioner timely moves for leave to file the Proposed Third Amended Petition and makes an unequivocal election to voluntarily dismiss the unexhausted claims presented in the First Amended Petition, the magistrate judge will recommend that the First Amended Petition be dismissed as a mixed petition in accordance with *Rose v. Lundy*, 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

III. Conclusion

In accordance with the foregoing, IT IS ORDERED that:

1. Petitioner's Application seeking leave to file the Proposed Second Amended Petition is **DENIED**.

2. Petitioner shall file not later than **February 20, 2001**, a Motion for Leave to File Proposed Third Amended Petition, Lodged on January 18, 2001. Petitioner may, as an alternative, file a Response to this Order not later than February 20, 2001, electing to stand on the First Amended Petition without striking the unexhausted claims. However, Petitioner is advised that if he chooses this latter alternative, the magistrate judge will recommend that Respondent's Motion to Dismiss the First Amended Petition be granted and that the action be dismissed.

Petitioner is advised and warned that his failure to timely file a Motion for Leave to File Proposed Third Amended Petition Lodged on January 18, 2001, or a Response to this Order electing to stand on the First Amended Petition shall be construed as either his consent to dismissal of the action for failure to prosecute or

disobedience with a Court Order warranting the dismissal of the action with prejudice pursuant to Fed.R.Civ.P. 41 (b).

IT IS SO ORDERED.

DATED: January 31, 2001.

s/_____
ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE

cc: JUDGE KELLER
All Parties

APPENDIX H

FILED
AUG 27 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSEPH HUNT, Petitioner, v. CAL TERHUNE, DIRECTOR OF THE CDC, et al., Respondents.	Case No. CV 98-5280-WDK (AN) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable William D. Keller, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, the magistrate judge recommends that the action be dismissed with prejudice.

On March 26, 2001, the Clerk filed the Notice of Filing of Magistrate Judge's Report and Recommendation and the Lodging of Proposed Judgment and/or Order (the "Notice"), which was served on the parties, together with a copy of the Report and Recommendation (the "R&R"). The R&R recommended, *inter alia*, dismissing the action with prejudice for petitioner's failure to prosecute and failure to obey the Court's orders.

Having received an extension of time, on May 4, 2001,

petitioner timely filed his Objections to the R&R with a supporting Memorandum of Points and Authorities. The Court fully-addressed most of petitioner's arguments in the R&R, as well as in the Court's Memorandum and Order filed November 22, 1999 (the "11/22/99 M&O"), the Court's Minute Order dated September 14, 2000, and the Court's Order Denying Petitioner's Application to File Proposed Second Amended Petition, filed January 31, 2001 (the "1/31/01 Order"), and they do not require further discussion. However, with respect to petitioner's challenge to the authority of the magistrate judge and his continued reliance on Anthony v. Cambra, 236 F.3d 568 (9th Cir. 2000), *cert. denied*, --- U.S. ---, 121 S.Ct. 2576 (2001), the Court adds the following.

1. The Magistrate Judge Made No "Claim-Dispositive Rulings."

Petitioner contends that "[t]he Magistrate's Order of November 22, 1999, which disposed of dozens of claims of the FAP, and the Order of January 31, 2001, which disposed of all the claims of the 2nd Am Pet were obviously 'dispositive of a claim' [because] [b]y means of these orders both the FAP and the 2nd Am Pet were 'involuntarily dismiss[ed].'" [Memorandum of Points and Authorities at 8-9.] Thus, petitioner asserts that he had "a statutory right" to seek review of these rulings before complying with the Court's orders to file either an amended petition containing only exhausted claims or a notice of voluntary dismissal. [Id. at 8-10.] Petitioner is mistaken.

In the 11/22/99 M&O, the magistrate judge found that some of the claims in petitioner's First Amended Petition were not exhausted and ordered petitioner to file either a motion for leave to file a Second Amended Petition along with a proposed Second Amended Petition containing only exhausted claims or a request for voluntary dismissal of the action without prejudice. [11/22/99 M&O at 46.] The magistrate judge advised petitioner that he "w[ould] recommend that

Respondent's Motion be granted and that the action be dismissed without prejudice unless Petitioner timely elect[ed] to voluntarily dismiss the unexhausted claims by serving and filing a Motion for Leave to File a Second Amended Petition containing only exhausted claims consistent with this Memorandum and Order." [Id. at 2-3.]

In the 1/31/01 Order, the magistrate judge denied petitioner's application seeking leave to file a proposed Second Amended Petition because it contained all but one of the claims that the magistrate judge previously found were not exhausted as well as 12 new claims, none of which had been exhausted when petitioner commenced this action. The Court ordered petitioner to either make "an unequivocal election to voluntarily dismiss the unexhausted claims presented in the First Amended Petition" or "elect [] to stand on the First Amended Petition without striking the unexhausted claims." [1/31/01 Order at 9-10.] However, the Court admonished petitioner that if he chose the latter alternative, "the magistrate judge will recommend that Respondent's Motion to Dismiss the First Amended Petition be granted and that the action be dismissed." [Id. at 10.]

Contrary to petitioner's assertions, neither of these orders was a "claim-dispositive ruling." "[A] magistrate can . . . dismiss a complaint with leave to amend without approval by the court." McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991). Likewise, "a motion to amend a complaint is 'a pretrial matter not dispositive of a claim or defense of a party' . . . ." *Pagano v. Frank*, 983 F.2d 343, 346 (1st Cir. 1993). Provided that the final decision is made by the district court, the delegation of these non-dispositive matters to a magistrate does not violate Article III of the Constitution. Britt v. Simi Valley Unified School District, 708 F.2d 452, 454 (9th Cir. 1983).

Further, as indicated multiple times by the magistrate judge, if petitioner elected to stand on his First Amended Petition, the magistrate judge would recommend that it be dismissed as a mixed petition; however, the ultimate decision rested with the district judge. [*See* 11/22/99 M&O at 2; Order re Petitioner's Objections to Memorandum and Order

Dismissing First Amended Petition with Leave to Amend, filed July 20, 2000, at 1-2 (the "7/20/00 Order"); 1/31/01 Order at 9-10.]

Moreover, although the Court was not required to do so, the district judge did review the 11/22/99 M&O when he reviewed and denied petitioner's motion to vacate the magistrate judge's September 14, 2000 Minute Order. [*See* Memorandum and Order Denying Petitioner's Request to Vacate Magistrate Judge's September 14, 2000 Minute Order, filed December 19, 2000 (the "12/19/00 M&O").] In his 12/19/00 M&O, the district judge specifically noted that he had reviewed, *inter alia*, "the two Applications filed by Petitioner on September 8, 2000," one of which sought to vacate the 11/22/99 M&O and the 7/20/00 Order.

Finally, the Court fully-complied with James v. Giles, 221 F.3d 1074, 1077-78 (9th Cir. 2000). In the 11/22/99 M&O, the magistrate judge provided petitioner "with notice of his petition's deficiencies" and granted him leave to amend to delete the unexhausted claims. Id. at 1077. Contrary to petitioner's contention, nothing in James, or in Noll v. Carlson, 809 F.2d 1446 (9th Cir. 1987), and Ferdik v. Bonzelet, 963 F.2d 1258 (9th Cir. 1992), upon which the James Court relied, requires the district judge to provide petitioner with the proverbial "second bite at the apple." The rule proposed by petitioner would not only frustrate the very purpose of magistrate judges, *i.e* to ease the burden on the district judges, it would also be entirely unworkable, as it would require the district judges to review and approve every order by a magistrate judge that dismissed a defective *pro se* complaint or petition and every order denying leave to amend filed by a *pro se* plaintiff or petitioner. Most significantly, however, such a burdensome rule is totally unnecessary. As the magistrate judge pointed out to petitioner, petitioner's objections to the magistrate judge's rulings on exhaustion are "reserved and are subject to further review by the United States District Judge assigned to this case." [7/20/00 Order at 1.] Accordingly, whether petitioner elected to stand on his First Amended

Petition or to file a Second Amended Petition containing only exhausted claims, upon the magistrate judge's filing of a report and recommendation to the district judge, petitioner could file objections challenging the magistrate judge's finding that certain claims were unexhausted. *See* McKeever v. Block, *supra*, 932 F.2d at 797 ("while the magistrate can dismiss complaints with leave to amend, the district court necessarily must review that decision before dismissing the entire action"). This is, in fact, precisely what petitioner ultimately did. [*See* Objections 2-9.]

2. Petitioner's Continued Reliance on Anthony v. Cambra is Misplaced.

Petitioner asserts that "the recent Ninth Circuit decision in Anthony v. Cambra, 236 F.3d 568 (9th Cir. 2000), . . . reflects the unanimous view of the federal court system that Rule 15 (c) (2) operates to cure the term of limitations problems of a diligent litigant who files a mixed federal petition, completes exhaustion while his case is still pending in federal court, and thereafter files an amended petition reasserting his original claims." [Memorandum of Points and Authorities at 17 (emphasis in original).] However, contrary to petitioner's apparent contention, there is no authority authorizing a district court to hold a mixed petition in abeyance while the petitioner returns to state court to exhaust his unexhausted claims.

It is beyond dispute that "'mixed' federal habeas petitions -- that is, those containing both exhausted and unexhausted claims -- must be dismissed for failure to exhaust state remedies." Anthony v. Cambra, *supra*, 236 F.3d at 573, *citing* Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). Although Ninth Circuit precedent "unequivocally authorizes district courts to stay fully exhausted federal petitions pending exhaustion of other claims," Anthony v. Cambra, *supra*, 236 F.3d at 575, petitioner never requested leave to invoke this procedure. Rather than complying with the Court's instructions to file an amended petition containing only

exhausted claims, and then filing a motion to stay that petition pending exhaustion of his remaining claims in state court, petitioner's mixed petition remained pending before this Court while petitioner, unbeknownst to the Court, returned to state court with his unexhausted claims and delayed these proceedings until the California Supreme Court acted on his state habeas petition. Nothing in the Anthony opinion authorizes or condones petitioner's surreptitious machinations.

Having carefully considered the Objections, the magistrate judge finds no reason set forth for changing the recommendation in any respect. IT IS THEREFORE THE FINAL RECOMMENDATION that the Court issue an order: (1) approving and adopting these reports and recommendations; (2) denying Petitioner's Application for an Order Staying the Proceeding Pending Adjudication of Petitioner's Objection to the 1/31/01 Order Dismissing the Second Amended Petition; (3) granting Respondent's Motion to Dismiss the First Amended Petition; (4) dismissing the First Amended Petition as a mixed petition containing unexhausted claims; and (5) directing that judgment be entered dismissing the action with prejudice.

DATED: August 13, 2001 /s_____

Arthur Nakazato
United States Magistrate Judge

FILED
AUG 27 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSEPH HUNT, Petitioner, v. CAL TERHUNE, DIRECTOR OF THE CDC, et al., Respondents.	)	Case No. CV 98-5280-WDK (AN) ORDER APPROVING AND ADOPTING REPORTS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the pleadings and all other papers in this case along with the attached Report and Recommendation and Final Report and Recommendation of the United States Magistrate Judge (the "Reports and Recommendations"), and has made a *de novo* determination.

IT IS ORDERED that:

(1) the Reports and Recommendations are approved and adopted;

(2) Petitioner's Application for an Order Staying the Proceeding Pending Adjudication of Petitioner's Objection to the 1/31/01 Order Dismissing the Second Amended Petition is denied;

(3) Respondent's Motion to Dismiss the First Amended Petition is granted;

(4) the First Amended Petition is dismissed as a mixed

petition containing unexhausted claims; and

(5) Judgment shall be entered dismissing the action with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Final Report and Recommendation, and the Judgment by the United States mail on the parties.

Dated: 8/23, 2001 /s_____

WILLIAM D. KELLER
UNITED STATES DISTRICT JUDGE

FILED
AUG 27 2001

ENTERED
AUG 28 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSEPH HUNT,	)	Case No. CV 98-5280-WDK (AN)
Petitioner,	)	
	)	JUDGMENT
v.	)	
	)	
CAL TERHUNE, DIRECTOR OF THE CDC, et al.,	)	
Respondents.	)	

IT IS HEREBY ADJUDGED that the action is dismissed with prejudice for the reasons stated in the related Report and Recommendation and Final Report and Recommendation of United States Magistrate Judge.

Dated: 8/23, 2001 s/_____
WILLIAM D. KELLER
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 31 2003
OFFICE OF THE CLERK

No. 03-520

In The

Supreme Court of the United States

CHERYL PLILER, Warden of
California State Prison, Sacramento,

Petitioner,

v.

JOSEPH HUNT,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Joseph Hunt, through his attorney Eric S. Multhaup, opposes the petition for writ of certiorari filed on behalf of Cheryl K. Pliler, Warden of California State Prison – Sacramento, by the Attorney General for the State of California (hereinafter "the State") for the following reasons.

STATEMENT OF THE CASE

Respondent generally concurs in the Statement of the Case contained in the Petition, pp. 4-8. Respondent will set forth any additional procedural or factual matters as necessary to support his argument, below.

REASONS FOR DENYING THE PETITION

The State proffers six reasons for granting the petition, which respondent addresses in turn.

I. THE PANEL OPINION DOES NOT CONFLICT WITH THE SPIRIT OR LETTER OF *ROSE V. LUNDY*.

The State has contrived a non-existent conflict between *Rose v. Lundy*, 455 U.S. 509 (1981) and the panel opinion in this case in an effort to villainize the stay and abeyance procedure adopted by the Ninth Circuit in this and other cases. The State's position relies almost entirely on certain language taken out of context from the panel opinion, and is repudiated by a fair reading of the overall

opinion and its precedent in *Ford v. Hubbard*, 330 F.3d 1086 (9th Cir. 2003). The State quotes one excerpt from the panel opinion that "Ninth Circuit authority 'contemplate[s] that district courts may stay and abey a mixed petition, permitting petitioner to return to state court and exhaust unexhausted claims' ", Petition, p. 8, quoting from App. A-15. The State implies that the Ninth Circuit contemplates that the *mixed* petition be stayed *in its entirety*, both exhausted and unexhausted claims, with the unexhausted claims moldering and festering in district court for some indeterminate period while the petitioner attempts to exhaust them in state court. The State complains that the retention of stayed but unexhausted claims conflicts with *Rose v. Lundy*.

The Ninth Circuit has *never* intended in this or any other case that the *un*exhausted claims be *retained* in district court while the petition pursued state remedies. To the contrary, by any fair reading of the panel opinion in this case and in *Ford*, the procedure requires that the unexhausted claims be *withdrawn* from the federal petition during the exhaustion process, so that the only document pending in federal court is a pristine petition comprised solely of exhausted claims. The Ninth Circuit characterized the district court's error in a manner that conveys with crystal clarity that the stay and abeyance procedure does *not* contemplate the retention of a mixed petition in district court:

> "Because the district court, in dismissing the First Amended Petition, acted on the premise that all claims had to have been exhausted at the time the petition was filed, it did not advise Hunt that he had the option to stay his First Amended Petition *after dismissal of unexhausted claims* to

> permit him to exhaust those claims and then add them by amendment to his stayed petition, as it was obliged to do." App. A-16 (emphasis supplied).

Clearly, the Ninth Circuit contemplated that the *un*exhausted claims would be surgically removed from the petition so that only exhausted claims remained pending in the district court, such that the petition could not be characterized as "mixed" and its pendency would not violate *Rose v. Lundy* or any of this Court's successive cases.

The State recognizes that the procedure approved by the panel does *not* contemplate the retention of a mixed petition in federal court, but only in its second argument, in which it correctly describes the Ninth Circuit as approving "a 'stay and abeyance' procedure whereby a mixed petition may be filed, *unexhausted claims dismissed*, and a stay of proceedings obtained for the purpose of exhausting the dismissed claims in state court", Petition, p. 10 (emphasis supplied). The State does not and cannot argue that the stay and abeyance procedure violates *Rose* where the procedure requires dismissal not retention of the unexhausted claims.

The State also quotes snippets from *Coleman v. Thompson*, 501 U.S. 722, 731 (1991), *Castille v. Peoples*, 489 U.S. 346, 349 (1989), and *Engle v. Isaac*, 456 U.S. 107, 124 n. 25 (1982) purporting to reiterate the *Rose* requirement that a mixed petition must be dismissed, Petition, pp. 9-10. However, nothing in those cases suggests that a petition from which unexhausted claims have been *removed* is nonetheless permanently tainted by the *former* presence of the unexhausted claims so as to require dismissal. *Coleman* did not involve any exhaustion issues

whatsoever, but merely referred to exhaustion jurisprudence in addressing a related topic of procedural default in state court as a bar to federal review. *Castille* simply held that the presentation of a claim to the Pennsylvania Supreme Court via a procedure for discretionary review analogous to California's pretrial writ procedure did *not* exhaust that claim for federal habeas corpus purposes. In *Engle*, this Court declared its "reluctan[ce] to interpolate an unexhausted claim not directly presented by the petition", because "*Rose v. Lundy* does not compel such harsh treatment of habeas petitions." 456 U.S. at 124, n. 25. None of these cases is remotely relevant to the determination of whether a petition that has been surgically stripped of unexhausted claims may be held in abeyance.

Nor is *Duncan v. Walker*, 533 U.S. 167 (2001), in which this Court held that the filing of a *federal* habeas corpus petition that was subsequently dismissed without prejudice did *not* toll the one year statute of limitations for purposes of calculating the timeliness of a second federal habeas corpus petition. There were no exhaustion issues raised in that case, although this Court did discuss some of the policies underlying the exhaustion requirement. In sum, the State's effort to persuade this Court that the Ninth Circuit stay and abeyance procedure somehow conflicts with *Rose* and it progeny is patently contrived. There is no reason for this Court to grant certiorari to resolve a fictitious problem contrived by a party.

II. THE STAY AND ABEYANCE PROCEDURE DOES NOT CONFLICT WITH THE AEDPA STATUTE OF LIMITATIONS.

In this section, the State claims that the stay and abeyance procedure would nefariously "eviscerate the AEDPA's

limitation period, and reduce district courts to a 'jurisdictional parking lot'", Petition at 10-11, quoting *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995). The State confuses the concept of tolling the statute of limitations with the concept of complying with the statute of limitations. The filing of a state petition prior to the expiration of the federal statute of limitation tolls it; the filing of a federal petition prior to the expiration of the statute of limitations complies constitutes compliance as to the claims contained in the petition. Regardless of how long it takes for those claims to reach a merits adjudication in federal court, they do not lose their statute of limitations compliance rating regardless of whether they remain continuously pending in federal court or are subject to a temporary dismissal followed by a re-insertion through dismissal, amendment, and relation back. There is no issue of tolling here; rather, it is a matter of compliance.

Sterling does not support the State's argument that the stay and abeyance procedure violates any aspect of this Court's jurisprudence. *Sterling* simply addressed the question of "whether an indigent state death row petitioner, who has failed to exhaust state remedies, may secure federally appointed and paid counsel to exhaust state remedies." 57 F.3d at 452-453. *Sterling* noted in passing that the district court correctly refused to stay an unabashedly *mixed* petition in federal court while the federally appointed attorney attempted to exhaust the unexhausted claims in state court. Neither the panel in this case nor the Ninth Circuit at large has ever espoused the staying of a *mixed* petition while the unexhausted portion of the mixed petition was being exhausted. None of the State's authorities establish any infirmity with the

stay and abeyance procedure, either regarding the statute of limitations or any other provision of the AEDPA.

III. THE RELATION BACK DOCTRINE OF RULE 15(c) IS CONSISTENT WITH FEDERAL HABEAS CORPUS LAW.

The State's argument regarding the inapplicability of the relation back doctrine of Rule 15(c), Fed. R. Civ. Proc., is frivolous. The State correctly notes that "Rule 15(c) applies only to proceedings that are governed by a statute of limitations", Petition, p. 12, but then notes that Rule 15(c) when enacted did not govern federal habeas corpus proceedings because there was no habeas statute of limitations then in existence. If the State is arguing that 15(c) is applicable only to statutes of limitations that were in existence at the time of the enactment of Rule 15(c), the State is being silly. If the State is arguing that the Rule 15(c) relation back doctrine should not be generally applicable to federal habeas proceedings for policy reasons, the State has completely failed to advance any such reasons.

The clear need for a relation back doctrine in federal habeas proceedings is clearly demonstrated by this case, in that respondent has *always* claimed that the claims deemed *un*exhausted by the district court *had* in fact been exhausted in the state court. The district court disagreed, and respondent had a tactical choice to make that was fraught with peril under the State's view of the relation back law. On one hand, respondent understood that the issue of exhaustion "will often prove difficult to determine", *Barresi v. Maloney*, 296 F.3d 48, 56 (1st Cir. 2003) [reversing district court for erroneous determination that claims had not been exhausted]. Respondent thus had the

option of appealing the dismissal, which he did, but which has so far consumed some two and a half years of time. Alternatively, had the stay and abeyance procedure been available with the relation back doctrine intact, respondent could have foregone the lengthy appeal, agreed to disagree with the district court as to exhaustion, and return to state court to obtain an undisputable ruling as to exhaustion within a period of *months* rather than *years*.

However, that clearly streamlined procedure was viable only insofar as the relation back doctrine was available; otherwise the State would attempt to trap respondent with a statute of limitations objection after respondent returned to federal court from the state exhaustion proceedings. The State offers no colorable reason why the expeditious stay and abeyance procedure should be functionally eliminated by the abrogation of the relation back doctrine. No sane habeas corpus petitioner would ever voluntarily dismiss an arguably exhausted claim in order to seek definitive resolution from the state court in the absence of a relation back doctrine because voluntary dismissal would be the functional equivalent of statute of limitations-assisted suicide.

IV. THE PANEL DECISION IS CONSISTENT WITH THE FIFTH AND EIGHTH CIRCUIT CASES CITED BY PETITIONER.

The State argues that "the panel's holding in that regard [the propriety of the stay and abeyance procedure] also conflicts with the decisions of at least two other circuit courts of appeal". Petition, p. 13. This argument provides no basis for granting certiorari for several reasons.

First, even assuming that Ninth Circuit procedure is different from or even in conflict with procedure from other circuits, there may be entirely practical reasons why such procedures could and should vary among the circuits of the country. Obviously, the exhaustion procedures *within* each of the 50 states vary considerably, and it is entirely possible that a federal court's response to a difficult exhaustion question could reasonably vary from region to region, and evolve over time.[1] So long as the federal court's response does not violate any provision of the AEDPA or any of this Court's jurisprudence, the mere fact of regional variation in exhaustion procedures provides no basis for this Court to grant certiorari.

Moreover, there is no conflict between the cases cited. All of the purportedly conflicting cases cited by the State involve the issue of whether a district court may stay a *mixed* federal petition that contains both exhausted *and* unexhausted claims for the period that the petitioner spends back in state court attempting to exhaust the unexhausted claims. *Victor v. Hopkins*, 90 F.3d 276, 282 (8th Cir. 1996) reversed an order by a district court staying a mixed petition in a capital case to permit the petitioner to exhaust the unexhausted claims – "We conclude

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[1] In this regard, the California Supreme Court has just restructured its procedures for conducting review of federal constitutional claims for purposes of exhausting state remedies. Effective January 1, 2004, new rule 33.3, Cal. Rules of Court, provides for a "petition for review to exhaust state remedies", which dispenses with the otherwise applicable requirements for a petition for review, and requires only a "brief statement of the factual and legal bases of the claim". Had this rule been in effect at the time of respondent's filings in the California Supreme Court, the district court could only have found that *all* claims in the First Amended Petition were duly exhausted.

that any suggestion in our prior cases that a district court has broad discretion to hold in abeyance a habeas petition *including both exhausted and unexhausted claims* pending exhaustion of state remedies is contrary to the Supreme Court's explicit directions in *Rose v. Lundy*" (emphasis supplied).

Respondent concurs that the procedure condemned in *Victor* violated *Rose*, but that is not the procedure endorsed by the Ninth Circuit. See part I, supra. More recently, the Eighth Circuit in *Akins v. Kenney*, 341 F.3d 681, 686 (8th Cir. 2003) essentially recognized and approved the procedure adopted by the Ninth Circuit. Akins argued on appeal that the district court had erred in dismissing his petition in its entirety because of the presence of some unexhausted claims, and that the district court "should have given him an opportunity to amend his petition to delete the unexhausted claims and allow him to proceed with the exhausted claims rather than face a complete dismissal, and thereby avoid the statute of limitations problem on the exhausted claims". Ibid. The Eighth Circuit reversed that portion of the district court decision and remanded with directions to proceed on the exhausted claims, but did not address the issue of whether the district court should consider a request to stay proceedings on the exhausted claims pending resolution of the unexhausted claims.

Similarly, the State's citation to Fifth Circuit cases is equally distinguishable, because the offending petition in *Sterling*, supra, "contain[ed] both exhausted and unexhausted claims", 57 F.3d at 451. The purported conflict is illusory, and the falsity of this illusion is clearly explained in *Zarvela v. Artuz*, 254 F.3d 374, 380 (2nd Cir. 2001) [cited by the State for a different proposition]:

> "Like the Seventh and Ninth Circuits, we think that the enactment of AEDPA warrants some adjustment in the pre-AEDPA requirement of *Rose v. Lundy* that mixed petitions be dismissed in their entirety. What the Supreme Court wanted to achieve, and what AEDPA reenforces, see 28 U.S.C. § 2254 (b)(1)(A), is the assurance that a district court will not grant relief on unexhausted claims. *That requirement of Lundy can be met by dismissing only the unexhausted claims.* As to the exhausted claims, we think a district court should exercise discretion either to stay further proceedings on the remaining portion of the petition or to dismiss the petition in its entirety. In many cases, a stay will be preferable." (Emphasis supplied)

Thus, there is no reason to grant certiorari to address the State's contrived characterization of a conflict between circuits for the two reasons that no conflict exists, and if it did, regional differences in addressing non-constitutional matters of criminal or habeas procedure are often to be encouraged rather than squelched.

V. THE SALUTARY ADVISEMENT TO PRO SE PETITIONERS ADOPTED BY THE PANEL REGARDING THE STATUTE OF LIMITATIONS PROMOTES A RESPECT FOR THE CONSTITUTION AND FOR THE GREAT WRIT.

The State argues that "no court (other than the Ninth Circuit) has ever held that a district court must advise a habeas petitioner that his federal claims may be time-barred, absent any equitable tolling, if he chooses to

dismiss a mixed petition and return to state court to exhaust his newly-presented claims", Petition, p. 15.[2] The State makes no claim that this advisement is in any way *wrong*, or *inaccurate*, or *seditious*. The implied criticism is that courts should not be in the business of giving habeas petitioners accurate information about the legal consequences of alternative courses of action.

Of course, federal courts *are* in the business of giving criminal defendants accurate information about the consequences of various choices, e.g., the consequences of guilty pleas. Indeed, in the specific context of habeas corpus proceedings, this Court recently concluded with respect to district court re-characterizations of miscellaneous motions as section 2255 petitions that federal courts must "warn the litigant that this re-characterization means that any subsequent § 2255 motion will be subject to the restrictions on 'second or successive' motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has". *Castro v. United States*, ___ U.S. ___, 72 U.S. L.W. 4105 (December 15, 2003).

This Court's justification for the warning regarding the implications of re-characterization is that it "can have

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[2] The panel opinion did not find that the district court erred in failing to advise respondent about the statute of limitations pitfalls potentially related to the dismissal of claims from the federal petition for state exhaustion purposes, so this is not an actual issue in this case. The panel found that the district court had committed the greater error in failing to advise respondent of the option to dismiss unexhausted claims and stay the exhausted claims. The statute of limitations advisement was an issue in *Ford*, and appears to have been carried over to the State's petition in this case.

serious consequences for the prisoner", ibid., just as serious as those that may accrue to a petitioner who is considering the dismissal of some or all of his claims as a step in the exhaustion process. The State does not argue that dismissal of some or all claims as part of an exhaustion procedure is *devoid* of any potentially serious consequences such that the warning is superfluous; in fact the State has no argument at all that the warnings promote anything but the interests of justice.

VI. THE SALUTARY ADVISEMENT ADOPTED BY THE PANEL DOES NOT CONFLICT WITH THE SECOND CIRCUIT'S RESOLUTION OF A RULE 60 MOTION.

Finally, the State conjures up another non-existent conflict between the *Ford* duty to advise of statute of limitations issues arising from dismissal of claims and *Warren v. Garvin*, 219 F.3d 111, 114 (2nd Cir. 2000), but this provides no basis for granting certiorari in this case because (1) the panel here did not adjudicate any claim of failure to advise on statute of limitations consequences of voluntary dismissal, and (2) *Warren* contains mere dicta relating to the petitioner's failure to abide by the one year statute of limitations of Rule 60(b), Fed. R. Civ. Proc., not the AEDPA statute of limitations.

CONCLUSION

Wherefore, for the foregoing reasons, respondent respectfully requests that this Court deny the petition for writ of certiorari.

Dated:

Respectfully submitted,

ERIC S. MULTHAUP
Attorney for Respondent
Joseph Hunt

(3)

No. 03-520

FILED
JAN 8 - 2004
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL K. PLILER, Warden of California State Prison - Sacramento, *Petitioner,*

v.

JOSEPH HUNT, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

No. 03-520

CHERYL K. PLILER, Warden of California State Prison - Sacramento, *Petitioner,*

v.

JOSEPH HUNT, *Respondent.*

Cheryl K. Pliler, Warden of California State Prison – Sacramento (the Warden), respectfully submits this reply to respondent Joseph Hunt's opposition to the petition for writ of certiorari (Opposition). In her petition, the Warden seeks review on the following question: Whether, given the enactment of a one-year limitation period for filing federal habeas petitions pursuant to 28 U.S.C. § 2244, the dismissal of a "mixed" habeas petition under *Rose v. Lundy* is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies, and advises the petitioner that if the court dismisses the petition the one-year limitation period may bar any future federal claims.

A. Consistency and Conflict Between the Circuits

This Court has unequivocally and repeatedly held that "a district court *must* dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. 509, 522 (1981) (emphasis added); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Castille v. Peoples*, 489

U.S. 346, 349 (1989); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982). It is undisputed that Hunt's First Amended Petition filed on August 31, 1998 contained unexhausted claims; it is also undisputed that Hunt failed to dismiss his unexhausted claims, but instead lodged a Second Amended Petition on January 18, 2001, which included all but one of the claims previously found by the court to be unexhausted, plus a number of new claims. *See* App. C7-C41, G4-G7.

Hunt maintains in his Opposition that the panel's reliance on *Ford v. Hubbard*, 330 F.3d 1086 (9th Cir. 2003), in support of its holding that the mixed First Amended Petition was erroneously dismissed does not imply "in this or any other case that . . . *un*exhausted claims be *retained* in district court while the petition[er] pursued state remedies." Opp'n at 2 (emphasis in original). To the contrary. In reaching its holding, the panel observes that Ninth Circuit authority "contemplate[s] that district courts may stay and abey a mixed petition, permitting petitioner to return to state court and exhaust unexhausted claims." App. A15; *see also* App. A16. No other circuit has *ever* held that a mixed habeas petition may *not* be dismissed under *Rose v. Lundy* unless the district court both informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies and advises the petitioner that if the court dismisses the petition the one-year limitation period of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) may bar any future federal claims. *See Ford v. Hubbard*, 330 F.3d at 1109 (Silverman, J., dissenting) ("Boldly going where no court has gone before . . . .").

The panel in effect *requires* district courts to entertain mixed habeas petitions where the advisements first announced in *Ford v. Hubbard* were not provided; dismissal under such circumstances, according to the panel, is "improper." App. A17. As set forth in the Warden's petition, the panel's holding in that regard conflicts with the decisions of at least three other circuit courts of appeals. *See, e.g.*, *Warren v. Garvin*, 219 F.3d

111, 114-15 (2d Cir. 2000) ("[A]ppellant knew of the 1-year limitations period for habeas petitions under the AEDPA, and his failure to timely refile (or to pursue his additional state claims) is merely garden variety neglect"); *Victor v. Hopkins*, 90 F.3d 276, 282 (8th Cir. 1996) ("We conclude that any suggestion in our prior cases that a district court has broad discretion to hold in abeyance a habeas petition including both exhausted and unexhausted claims pending exhaustion of state remedies is contrary to the Supreme Court's explicit directions in *Rose v. Lundy*"); *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995) ("The district court must also dismiss a mixed petition, such as Sterling's petition, containing both exhausted and unexhausted claims").

Most recently, in *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003), the Eighth Circuit addressed a habeas petitioner's claim that the district court should have stayed his mixed petition while he exhausted his newly-presented claims, in part because the AEDPA's one-year period of limitation had lapsed while his petition was pending in federal court. *Id.* at 685. As the court noted in reviewing the claim, "absent a stay or equitable tolling, Akins will be unable to return to federal court following exhaustion of his state court remedies." *Id.* The court nevertheless rejected the petitioner's contention, and held:

> Several circuits have concluded that a stay is required or is reasonable in cases of mixed habeas petitions where a dismissal would "jeopardize the petitioner's ability to obtain federal review" in light of AEDPA's one-year statute of limitation. *Nowaczyk* [*v. Warden, New Hampshire State Prison*], 299 F.3d [69,] . . . 79 [(1st Cir. 2002)]; *see also Brambles v. Duncan*, 330 F.3d 1197, 1203 (9th Cir. 2003); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002); *Zarvela v. Artuz*, 254 F.3d 374, 380 (2d Cir. 2001), *cert. denied*, 534 U.S. 1015 . . .

(2001); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000), *cert. denied*, 531 U.S. 946 (2000).[1] Justice Stevens stated in his concurring opinion in *Duncan* [*v. Walker*, 533 U.S. 167 (2001)] that "although the Court's pre-AEDPA decision in *Rose v. Lundy* prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies." *Duncan*, 533 U.S. at 182-83 . . . (Stevens, J., concurring in part and concurring in the judgment) (citation omitted).

While this view may be the "growing consensus," *Nowaczyk*, 299 F.3d at 79, it has not yet been adopted by a majority of the members of the Supreme Court or by this circuit. Absent contrary controlling Supreme Court authority, we are bound to follow our own precedents and the Supreme Court's view as expressed in *Rose v. Lundy*. We have held, post-AEDPA, that "a district court has no authority to hold a habeas petition containing

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1. It should be noted that, of the cases cited by the *Akins* court regarding stays pending exhaustion, *Nowaczyk* involved the stay of a *fully-exhausted* petition, 299 F.3d at 80, *Palmer* upheld the dismissal of a *second*, untimely petition, 276 F.3d at 781-82, *Zarvela* required the *dismissal* of unexhausted claims prior to the grant of any stay, 254 F.3d at 380-82, and *Freeman* noted that "a prisoner who wants to pursue state relief while assuring an entitlement to federal relief can protect himself by filing in *both* courts." 208 F.3d at 577 (emphasis added). Only *Brambles* (itself a Ninth Circuit case) relied upon the principles announced by the majority in *Ford* and followed by the panel in this case.

> unexhausted claims in abeyance absent truly exceptional circumstances, such as when state remedies are inadequate or fail to afford a full and fair adjudication of federal claims, or when exhaustion in state court would be futile." *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (citing *Victor v. Hopkins*, 90 F.3d [at 279-80 & n.2, 282 . . .]). Habeas petitioners who delay filing for state postconviction relief "should be held responsible for their failure to fulfill the long-standing requirement that they exhaust state remedies." *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001). Akins has asserted unexhausted claims and there is no showing that it would be futile for him to pursue his available state court remedy, which he would have been wise to pursue in the first instance. We cannot conclude that the district court abused its discretion in not granting a stay *sua sponte*. *See Thompson v. Sec. for Dep't of Corr.*, 320 F.3d 1228, 1229-30 & n.3 (11th Cir. 2003) (holding district court did not abuse its discretion by dismissing mixed petition in spite of petitioner's argument that he had no choice but to file a mixed petition in order to meet the one-year filing deadline of AEDPA and preserve federal review for the exhausted claims).

Id. at 685-86.

As in *Akins*, the one-year limitation period lapsed while Hunt pursued his unexhausted claims in district court. Courts, however, "are bound to follow . . . the Supreme Court's view [requiring dismissal of mixed petitions] as expressed in *Rose v. Lundy*." 341 F.3d at 686. Accordingly, the panel's decision is in direct conflict with the holdings of this Court and at least three other circuit courts of appeals.

B. "Stay and Abeyance" and Statute of Limitations

Despite Hunt's contention that "[n]one of the State's authorities establish any infirmity with the stay and abeyance procedure, either regarding the statute of limitations or any other provision of the AEDPA," Opp'n at 5-6, the panel, by its holding, has institutionalized a procedure that promotes the amendment of stayed petitions with newly-exhausted (but time-barred) claims. This Court has recently insisted that only the timely filing of a claim in *state court* may toll the AEDPA's limitation period, *see Duncan v. Walker*, 533 U.S. at 179-80; the panel, however, holds that the timely filing of a habeas petition in *federal court* may accomplish the same goal. *See* App. A15-A17.

The panel's holding also encourages piecemeal litigation. In *Rose v. Lundy*, this Court observed that "strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition." 455 U.S. at 520. Similarly, the purpose of the AEDPA is to encourage habeas petitioners to file *timely* and *fully exhausted* single habeas petitions. *See Duncan v. Walker*, 533 U.S. at 179-80. The panel's holding, in contrast, encourages the filing of mixed habeas petitions and the consideration of time-barred claims. Nothing Hunt has cited suggests otherwise.

C. Rule of Civil Procedure 15(c) and "Relation Back"

Hunt also contends that "relation back" under Rule of Civil Procedure 15(c) should apply in this matter because "otherwise the State would attempt to trap [him] with a statute of limitations objection after [he] returned to federal court from the state exhaustion proceedings." Opp'n at 7. As set forth in the Warden's petition, however, application of Rule 15(c) to habeas cases is inconsistent with the plain meaning of

the AEDPA. *See Duncan v. Walker*, 533 U.S. at 179-80.

To allow relation back of claims where the limitation period had expired prior to their presentation in *state* court would be contrary to "the law that provides the statute of limitations applicable to the action . . . ." *See* Fed. R. Civ. P. 15(c); Rule 11, foll. 28 U.S.C. § 2254; *see also Harris v. Nelson*, 394 U.S. 286, 294 (1969) ("Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense").

D. "Salutary" Advisements

Finally, Hunt claims that the advisements required by the majority in *Ford v. Hubbard* and relied upon by the panel in this case "promote . . . the interests of justice." Opp'n at 12. Nothing in this Court's jurisprudence suggests that *any* advisements are required before a mixed petition may be dismissed under *Rose v. Lundy*. *See Coleman v. Thompson*, 501 U.S. at 731; *Castille v. Peoples*, 489 U.S. at 349. As Judge Silverman, dissenting in *Ford v. Hubbard*, aptly observed:

> Ford filed an improper mixed petition. The district court correctly offered him the option of either amending the petition by deleting the unexhausted claims and proceeding with only those that had been exhausted, or suffering the dismissal of his entire petition without prejudice. This is exactly what a district court is supposed to do. When Ford did not express a choice, the district court again did exactly what it was supposed to do: It dismissed Ford's mixed petition without prejudice.

Ford v. Hubbard, 330 F.3d at 1107 (citations omitted).

Judge Silverman also observed that the majority's requirement that district judges inform petitioners of the AEDPA's limitation period "fail[ed] to take account of the fact that the district judge will almost never be able to tell, solely from the face of the petition, that the statute of limitations has expired." *Ford v. Hubbard*, 330 F.3d at 1108. As Judge Silverman noted:

> Numerous factors can affect a petitioner's decision to delete unexhausted claims and proceed with an amended petition, rather than accept dismissal without prejudice so that unexhausted claims can be pursued in state court. For example, the meritoriousness of the unexhausted claims is an extremely important factor; so is the fact that the failure-to-exhaust might foreclose those claims forever. The availability of key witnesses is another factor. The statute of limitations is only one element in the equation, and a fact-intensive one at that. Leaving aside the question of the proper role of the court as a neutral arbiter, the district court simply is in no position to identify all of the considerations that pertain. I respectfully suggest that it is the office of the court to fairly and impartially decide the case before it, not to act as the petitioner's paralegal.

Id. at 1109.

Guidance from this Court is therefore necessary.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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